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RICHARD T. ELY, PH.D., LL.D.

PROFESSOR OF POLITICAL ECONOMY,
UNIVERSITY OF WISCONSIN

THE PRINCIPLES OF ANTHROPOLOGY
AND SOCIOLOGY IN THEIR
RELATIONS TO CRIMINAL
PROCEDURE

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CRIMINAL PROCEDURE.** By MAURICE PARMELEE.
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THE
Principles of Anthropology
and Sociology in Their
Relations to Criminal
Procedure

BY

MAURICE PARMELEE, M.A.

"La science de la justice et la science
de la nature sont une. Il faut que la
justice devienne une médecine s'éclair-
ant des sciences psychologiques."

—Michelet

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INTRODUCTION

The recent progress of civilization has caused few greater changes than in the treatment of the criminal. It is scarcely more than a century since criminals were treated with the greatest cruelty. Torture was frequently used to extort confessions and many of the penalties inflicted were most brutal. But the eighteenth century philosophers inspired by a humanitarian feeling protested against these abuses as they did against every form of inhumanity. This protest combined with other forces resulted in the abolition of torture in most civilized countries and in making punishment much more humane. The power of judges which had been very arbitrary was greatly restricted and penalties are now inflicted only under the sanction of the penal code.

The work of the nineteenth century along these lines, therefore, has been to render the treatment of the criminal humane and to subject it to a strict régime of law. In the latter part of the nineteenth century a new science of criminology has been developed. This science is divided into two branches, criminal anthropology and criminal sociology. The first of these two branches deals with the criminal man, his physiological and psychological character-

istics, etc. The second deals with the social causes of crime. Criminal anthropology and sociology are of the greatest importance and significance for the treatment of the criminal. The application of their principles to this treatment does not mean the denial of the principles which have been established during the nineteenth century, namely, that this treatment shall be humane and that it shall be regulated by law. But it may modify in certain respects the way in which these latter principles are to be applied.

These two sciences, criminal anthropology and sociology, do not require that punishment shall be cruel and inhuman. But the tendency in applying the principle that punishment shall be humane has been to work solely for the reduction of punishment, whereas the principle of social defense which, as we shall see, grows out of these sciences requires that penalties shall be adapted to the criminals and the crimes they have committed. This means that penalties must sometimes be increased instead of reduced in severity. In like manner these sciences do not require that the treatment of the criminal shall be independent of the law. But they would replace the rigid regulation of the law by more flexible and scientific standards, which will permit of the individualization of punishment which we shall discuss further on.

The problem before us therefore is that of the readjustment of the application of these principles, so that the data of criminology can be utilized in the treatment of criminals. To solve this problem

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it is necessary to study on the one hand criminal law and procedure, and on the other hand criminal anthropology and sociology.

This new science of criminology has been developed almost entirely on the Continent. Criminological problems are being studied there not only by anthropologists, sociologists and jurists, but also by neurologists, alienists, psychologists, philosophers, etc. In America there has been almost no study of this science. But penology which deals with the treatment of the criminal after conviction has been studied quite extensively. This has been rather illogical, because law and criminology should be studied before penology. This reversal in the order of study has probably been caused by the many practical reforms which have been introduced in this country. Since this is a new country it has been possible to develop along somewhat new lines. The first reforms were in the construction of prisons of which many new ones had to be built. As early as 1831 the French government sent a commission of two, one of whom was Alexander De Tocqueville, to study American penal institutions. At first this development was inspired only by the humane desire to improve the conditions of the convict. Then gradually the idea of the reformation of the criminal began to filter in and found expression in the establishment of reformatories. The first of these, opened at Elmira, N. Y. in 1876, set the model for many more in other states. At Elmira have been introduced many forms of physical and mental

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treatment for the reformation of the criminal, some of which have been very successful.

With the reformatory movement has been introduced the indeterminate sentence which is also a modification of criminal procedure. Other modifications in procedure have been juvenile courts, conditional release or probation, etc. These modifications have, like the reformatory movement, had the reformation of the criminal in view, and have been almost entirely empirical in their character.

It is now very essential that these reforms should be studied in the light of this new science of criminology, and that they should be given a sound scientific basis. European science and American practical reform should be brought together. As an English writer has expressed it: "The European criminologists have worked for the most part purely as scientific investigators. The founders of Elmira, on the other hand, seem to have been guided purely by practical and social considerations, and to have had no knowledge of the scientific movement that was arising in Europe. In the future, there is now good reason to hope, these two currents of scientific advance and practical social progress will be united."¹

We can, therefore, take the work of the Continental criminologists as the scientific basis of our study. The logical order of study then is that of procedure and finally of penology just as the chronological order in the practical working of procedure

¹ Havelock Ellis, in the preface to *The New York State Reformatory in Elmira*, Alexander Winter, London, 1891.

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and of penal treatment is procedure before penal treatment. The penal treatment depends upon the procedure because it is the procedure that decides who is to have the treatment, and also to a certain extent their classification and the kind and length of treatment. It is also true that the study of penal treatment reacts on procedure and frequently causes great changes in it so that there is an intimate relation between the two.

In this book we are to study criminal procedure from the point of view of the modern science of criminology. It is evident that such a book is no purely legal treatise. We do not regard procedure merely as a legal process. Our conception is much more philosophic for we regard criminal procedure as a process by means of which the class called criminal is separated from the rest of society. It is one of the most important agencies of organized society, and the study of it is involved with some of the profoundest problems of political and social science. We shall endeavor to show not only its legal aspect, which is the only one usually thought of and studied, but also its great political and social importance.

This study is of great practical importance to-day on account of the modifications in procedure to which we have just referred. But it is also of great importance for the development of the science of criminology. In fact it is doubtful if there is any study more necessary to-day for this purpose than this one. It is by putting into practise the principles that have already been discovered and utilizing

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the data that have already been gathered that the science can be most rapidly developed. In this book will be pointed out the applications of criminal anthropology and sociology to procedure, thus aiding this rapid development.

The plan of this book will be as follows. In the first two chapters the development of the science of criminology will be described and the conclusions and data of criminal anthropology and sociology will be summarized. In the next chapter the question of the relation of the criminal to society and the question of penal responsibility will be discussed. In the fourth chapter the principle of the individualization of punishment will be expounded. In the fifth chapter the significance of this new science for the fundamental principles of criminal law will be indicated. In the sixth chapter the two fundamental types of procedure will be described. Then in each succeeding chapter one part of procedure will be taken up indicating the applications of criminal anthropology and sociology in each case. The book will end with an outline of a more or less new system of procedure based on a sound scientific basis.

CHAPTER I

THE SCIENCE OF CRIMINOLOGY

The eighteenth century witnessed an awakening of interest in social problems which preceded and to a considerable extent prepared the way for the great political and social revolutions of modern times. This awakening among the eighteenth century philosophers, Montesquieu, Voltaire, Rousseau, the Encyclopedists, etc., was caused, in the first place, by a humanitarian feeling which revolted from the horrors of war and the cruelty and oppression of tyrants. It was also caused by a study of the history of the liberal forms of government which had existed in the past, such as the aristocracies and democracies of Greece and Rome in ancient times and of Italy in the Middle Ages. From this study were deduced the principles with regard to the extent of individual liberty and the limitations of the powers of government and of sovereignty which furnished the theoretic basis for the great revolutions which soon followed.

Among the evils attacked by these writers was the treatment of criminals and of those accused of crime. Again and again in their writings we find condemnation of various features of the sys-

tem of criminal procedure and penal treatment which then existed almost universally, such as the almost unlimited power of the judge, the use of torture to extort confession, and the many barbaric punishments inflicted. In opposing these abuses they insisted upon the rights of humanity and proposed more just, humane and rational methods of treatment.

The principles enunciated by these writers with regard to crime were collected and stated in the "*Crimes and Punishments*" of Cesare Beccaria, which was published in 1764. In this famous book Beccaria summed up so successfully the contributions of the eighteenth century philosophers to criminal jurisprudence that it became the theoretic basis for the great reforms in criminal procedure which soon followed, and its principles still underlie to a considerable extent most of the existing systems of procedure. It also furnished the startingpoint for the classical school of criminology. For these reasons we will give a summary of those parts of the book which still have practical importance.

After describing the haphazard origin of penal codes and showing that most laws are the result of chance and not of careful thought, he declares that the object of law should be the greatest happiness of the greatest number.¹ He then states the doctrine of the social contract. This doctrine had been enunciated two years before by Rousseau in his "*Contrat Social*." According to this doctrine

¹ Int.

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men were absolutely free and independent in a state of nature. Then coming together to live each gave up a small part of his freedom in accordance with the social contract in order to obtain the benefits of union. The sum total of this power given up by each individual is exercised by the sovereign or executive branch of the government, according to the laws passed by the legislative branch which may be democratic, aristocratic, or of some other form. This doctrine has no foundation in history, and it is quite probable that Rousseau himself knew that it was a fiction. But it very distinctly asserted the liberty of the individual as a fundamental and original right and could be used very effectively against the tyrannical use of power. Beccaria starts out with this conception of the social contract as the basis of society. But each individual has a tendency to overstep the bounds of the social contract, and to commit acts which destroy it, such acts being crimes.¹ The right of punishment is derived from the necessity of suppressing such acts in order to preserve the social contract, any other use of this right being tyrannical.² Penalties can be imposed only in accordance with laws passed by a legislator or by legislators representing all of society united by the social contract. The duty of judges is only to decide whether or not the laws have been broken.³ The judges have no right to interpret the laws according to their own ideas of justice, but must apply them exactly as they have been legislated.⁴ The laws, therefore, should not be obscure

¹ Ch. I.

² Ch. II.

³ Ch. III.

⁴ Ch. IV.

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so as to need any interpretation, and should be printed in the common language so as to be within the reach of all.¹ The measure of punishment should be the injury done to the public welfare by a crime, and not the intention of the criminal.²

Crimes are divided into those against the existence of society and government, those against the person, property, and honor of an individual, and those against the public welfare.³ The object of punishment is to restrain the criminal from doing further injury to society and to turn others from similar crimes.⁴

Every reasonable human being is a reliable witness provided his or her credibility is not diminished by relations of friendship or of enmity with the accused. One witness of guilt is not sufficient for conviction because counterbalanced by the word of the accused. The greater the atrocity of a crime, the stronger evidence required on account of its improbability.⁵ Proof is no stronger than the weakest link in the chain of argument. Perfect proof excludes possibility of innocence. Imperfect proof does not exclude this possibility. Those who wish should be judged by their peers.⁶ Punishment should be prompt and certain thus obviating any need for harshness.⁷ Crimes against the person should receive punishment of the person.⁸ Thefts without violence should be punished with enforced

¹ Ch. V.

² Chs. VI and VII.

³ Chs. VIII-XI.

⁴ Ch. XII.

⁵ Ch. XIII.

⁶ Ch. XIV.

⁷ Chs. XIX and XXVII.

⁸ Ch. XX.

labor.¹ Society should be regarded as a group of men each having his own individual rights and liberties, and not as a family with an autocratic government.² The death penalty is not just, does not prevent crime, and increases the sentiment of cruelty in society.³ The power of imprisonment should be strictly guarded and exercised only under conditions specified by the law and not at the discretion of a judge.⁴ Trial should follow promptly after accusation and definite limitations should be placed to the time of bringing accusations.⁵ Crimes difficult to prove should be carefully tried.⁶ Crimes commenced should not be punished as severely as those consummated. Accomplices should be punished with equal severity and no impunity should be permitted for information given.⁷ Crime can be prevented by good laws, by the spread of knowledge, by the distribution of prizes and by education.⁸ The tribunals should be more numerous in order to prevent corruption and usurpations of the laws.⁹ Pardon would be unnecessary with just and moderate punishments.¹⁰ "In order that every punishment should not be an act of violence exercised by a single person or several persons against a citizen, it should be essentially public, prompt, necessary, proportioned to the crime, dictated by the laws, and the least rigorous possible in the given circumstances."¹¹ With these words Beccaria

¹ Ch. XXII.

² Ch. XXVI.

³ Ch. XXVIII.

⁴ Ch. XXIX.

⁵ Ch. XXX.

⁶ Ch. XXXI.

⁷ Ch. XXXVII.

⁸ Chs. XLI, XLII, XLIV, XLV.

⁹ Ch. XLIII.

¹⁰ Ch. XLVI.

¹¹ Ch. XLVII.

ends his book. In other chapters which now have a historical interest only he attacked such abuses as secret accusations, torture, confiscations, etc.

Out of the thought and writings of these eighteenth century philosophers grew the classical school of criminology which has dominated the development of penal codes and systems of procedure during the nineteenth century. This school was inspired, as we have seen, by a humane spirit which revolted against the cruelty with which criminals were being treated. Their first great principle was the same principle of individualism which inspired the French Revolution, namely, that the rights and liberties of the individual must be conserved. All persons being equal those having committed the same crime should be treated alike. From this was derived the second great principle, namely, that crime is a juridical abstraction. Consequently a penalty which was invariably inflicted was attached to each crime. This principle turned the attention away from the criminal to the crime alone. A third principle was that punishment should be limited by the social need and the tendency was towards the diminution of punishment. The social utility of punishment consisted in its intimidatory power and as much punishment was necessary as would intimidate others from committing the same crime. The amount of injury done to society also helped sometimes to determine the penalty.

Back of these principles though not so clearly formulated was a belief in the existence of a free will. The necessary corollary of this belief is that

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a criminal is morally responsible for the crimes he has committed. This was the deduction made by the classical school. Consequently all persons who had committed the same crime were equally guilty and it became unnecessary to give any further thought to the nature of the criminal. It would perhaps have been more logical if this school, when classifying crimes and determining their enormity, had been guided by a theologico-ethical standard which would have indicated the extent of moral guilt in each crime. But in practise it was governed by the social significance of each crime and the standard of judgment was based as we have seen upon the amount of intimidation required and the injury done to society. The penalty for each crime was predetermined by the penal code prepared by the legislature and the only duty of the judge was to mete out punishment in accordance with this code as soon as guilt had been proved. This was the original form of the theory of the classical school and it was first exemplified in the French penal code of 1791. That it was in harmony with the spirit of the time is shown in the following passage: "This purely objective penal system is what it has been agreed to call the classical theory, not in the traditional sense, but as conforming to this spirit of abstraction and of rational generalization which has remained the characteristic of intellectual education in France for at least two centuries. At last there is taking place to-day against this classicism in every order of ideas a

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reaction to which the work of Taine and all the historical school will have contributed powerfully.”¹

Gradually modifications crept into the practise of this school. It was recognized that exceptions must be made to the theory of penal responsibility in case of mental alienation, extreme youth, etc. Consequently punishment and guilt were now determined by the degree of responsibility. This theory has sometimes been called neoclassical. “Since responsibility was founded upon the idea of liberty, justice required that the penalty should be proportioned to the degree of liberty. Justice required the penalty should be entirely removed where liberty was lacking....It is what might be called the neoclassical theory.”²

Another modification has been made by the so-called correctionalist school which has attempted to utilize punishment for the moral and juridical reformation of the criminal. As we have seen this tendency has been very strong in America. But this use of punishment has been made without denying the fundamental principles of the classical school. In fact these principles remain essentially the same as when formulated by Beccaria in 1764.

The classical school has laid claim to having founded a science of criminology and as compared with what preceded it has some justification for its claim. In the place of irregular methods of procedure and absurd methods of testing evidence it

¹ R. Saleilles: *L'individualisation de la peine*, Paris, 1898, p. 49.

² Saleilles, *Op. cit.* pp. 70-71.

has substituted an orderly procedure and rational rules of evidence. It has classified crimes quite accurately according to its own theory of punishment. It has endeavored to keep criminal treatment well within the social need, thus conserving the fundamental rights and liberties of the individual. But this school was founded before the great modern development of the biological sciences and has been very slightly influenced by this development. It has to a slight extent accepted the conclusions of the higher branches of the biological sciences which study the physiological and psychological characteristics of man and differentiate by so doing the types of men. But to accept these conclusions to any great extent would be to destroy the fundamental theory of this school, namely, that the treatment of the criminal is to be determined by the crime committed and not by the nature of the criminal.

It was therefore left to a more recent school of criminology to utilize the results of modern science in developing a science of criminology. This school, usually called the positive school, was inaugurated in 1872 by the famous Italian anthropologist Cesare Lombroso. Believing it necessary to know the criminal in order to understand the causes of his crime, he spent the years from 1872 to 1876 in studying the anthropological characteristics of prisoners in Italian penitentiaries. In 1876 he published the results of his work in his book on criminal man which at first remained almost unnoticed. But in 1878 its second edition was accompanied by

the appearance of two monographs which supplemented the anthropological studies of Lombroso from the side of law and of sociology. Raffaele Garofalo published an essay in which he declared that the dangerousness of the criminal was the criterion by which society should be guided in its fight against crime. Enrico Ferri published a monograph in which he denied the doctrine of free will and personal responsibility and declared that the science of criminology must look to the life of society for its facts. In 1881 Ferri published the first edition of his great work on criminal sociology, and in 1885 Garofalo published his work on criminology. These books still more firmly established this new school of criminology. Because these three men and others who have contributed to the work of this school are Italians it has sometimes been called the Italian school of criminology. But this is not an accurate title since it has adherents all over Europe and is being rapidly developed in France, Germany and in other countries as well as in Italy.

The word "positive" when used in the name of the positive school of criminology has the same significance that it has in the phrase "positive science." Modern science is frequently called positive because it uses a method which brings positive and definite results. In medieval times it was customary to base a system of philosophy upon *a priori* assumptions. As soon as the assumptions were disproved the system of philosophy went to pieces. Thus system after system of philosophy

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has been built up with much labor and then disappeared leaving little or nothing behind. But modern science has adopted the inductive method. It has first sought the facts. There has frequently been difference of opinion as to the significance of certain facts and many interpretations have proved to be false. But the facts if carefully verified have remained as a permanent heritage which has served as a basis upon which to build. As a sufficient number of phenomena have been observed, the laws in accordance with which they act have been determined. Thus a more or less durable scientific structure has been constructed.

This positive, inductive method was first applied to the inorganic sciences with fruitful results. It was then extended to the lower of the organic or biological sciences and finally to those more complex sciences which deal with human and social phenomena. Against this there has been a good deal of outcry since it denied the belief that because man has moral liberty he is radically different from the rest of the universe and not under the same laws. But the development of social science has furnished strong evidence that human and social phenomena also are governed by law, though on account of the complexity of the phenomena it has not been possible to determine their laws very definitely.

The application of the positive method to the study of crime has shown, as already stated, that the classical school has not developed a science of criminology. According to this school the cause

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of crime exists in the free will of the individual. It is not a thing whose laws can be determined and calculated like those of physical phenomena. The classical school, therefore, has not developed a science of criminology because the workings of moral free will cannot be reduced to the terms of scientific laws. It would seem as if it was unnecessary for the new school to call itself "positive" since it would have been sufficient to call itself the scientific school to be differentiated from the classical school. But the latter school does not realize that it has forfeited its title to the name scientific by retaining moral liberty as the basis of penal responsibility, and it would have insisted that it was as scientific as the scientific school. It therefore became necessary for the new school to adopt some other name in order to differentiate itself. The new scientific school of criminology will have to retain the name positive as long as it is in a belligerent state. It is now on the offensive against the classical school and the penal codes and systems of procedure inspired by that school. If it wins in this fight it can drop this name and become simply the scientific school of criminology in the sense that it believes that crime is governed by laws as positive and definite as those by which other phenomena are governed.

We see, therefore, that the positive school has given birth to the new science of criminology. What are the fundamental principles of this school? We have already indicated that it does not accept moral liberty as a basis for penal responsibility.

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This does not mean that the existence of a free will is necessarily denied. As a matter of fact some representatives of this school deny it and others do not. But they all agree that even if it exists it is something so incalculable in its character that it cannot be considered in developing a science of criminology and in the practical treatment of crime.

Leaving aside therefore the question of free will the positive school studies the causes of crime which are tangible and can be measured. Some of these causes are inside and others outside of the criminal. Whether or not a free will has anything to do with it, the physical and psychical characteristics of the criminal very frequently have a great deal to do with causing crime. The positive school therefore establishes a subjective as well as an objective criterion of criminality. We shall see that in the treatment of the criminal it considers his character of more importance as a criterion than that of his crime.

In criminal anthropology and sociology we take up the study of these causes of crime. In criminal anthropology the individual criminal is studied. It is divided into criminal physiology and criminal psychology. In the first we study the purely physical characteristics of the criminal, the anatomical and other hereditary characteristics which predispose him to become a criminal and the physiological characteristics which develop after birth. It is closely connected with medical science in the study of certain diseases, such as epilepsy, neuras-

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thenia, etc., which predispose an individual for crime. In criminal psychology we study the mental states of the criminal. This study is very largely in the realm of psychiatry since the mental states of the criminal are frequently abnormal. Criminal sociology studies the social causes of crime. The criminal sociologist searches in the environment of the criminal for the forces which have led him into crime. These forces are so numerous, so varied in kind and so complicated as to make the search very long and difficult.

On the practical side we have criminal jurisprudence and penology. In criminal jurisprudence are included the fundamental principles of criminal law, penal codes and criminal procedure. Of these three procedure is of the greatest practical importance because it puts the other two into operation. As we shall see, the application of these new principles will make procedure still more important in its relation to criminal law and penal codes. For these reasons we have chosen procedure as the special subject of this study, but in the course of it we shall have to devote some attention to criminal law and penal codes. In penology we study the penal treatment inflicted upon criminals. An intimate relation exists between the study of these two subjects which should be established in the practical operation of procedure and penal treatment. At the same time a clear distinction must be made between them because of the difference in the status of the people with whom they deal. Criminal procedure is a process of examination

and segregation by means of which it is determined what persons are in need of penal treatment. Penal systems and institutions are for those for whom it has been decided that such treatment is necessary. This distinction has sometimes been expressed by saying that procedure is for honest people while the penal code is for criminals.

Criminal procedure and penal treatment are society's direct methods of repressing crime. But the scientists of the positive school have gone further and have undertaken the study of the indirect methods of repressing crime by eliminating its causes from society. Believing that these causes can be more or less definitely determined they wish also to discover the means by which they can be suppressed. In doing this these scientists have been entirely logical and have shown much foresight. It is undoubtedly true that more can be accomplished towards suppressing crime in the long run by indirect methods than by the direct methods, and it is greatly to the credit of the scientists of the positive school that they have laid so much emphasis on these indirect methods. But it is doubtful if this study can be included, strictly speaking, within the limits of criminology as some of these scientists have done. It belongs rather to the study of social hygiene which is the practical side of sociology. It is a study which goes very far afield in the social sciences. To it all these sciences contribute and of these the new science of criminology may contribute the most, but it can hardly claim to include it.

CHAPTER II

CRIMINAL ANTHROPOLOGY AND SOCIOLOGY

The leader of the positive school of criminology has been the veteran Italian criminal anthropologist, Lombroso. More than any other man he has stimulated the development of the new science of criminology. His original and versatile genius and aggressive personality have led in this great movement towards the application of the positive method to the problem of crime. As a pioneer in the anthropological study of the criminal he was bound to make mistakes and his impetuous temperament leading him sometimes to generalizations drawn too hastily has tended to increase the number of these mistakes. On account of these mistakes as well as because he has been a pioneer, he has suffered from a great deal of criticism. But with the aid of these criticisms, the researches of others and his own further researches he has been able to correct most of these mistakes and to develop a well-rounded theory of the anthropological characteristics of the criminal. His great work on criminal man¹ is the most synthetic study of this subject which has yet been made and in it can be traced the

¹ *L'homme criminel*, Paris, 1895.

development of his theory. We shall therefore devote the first part of this chapter to a summary of the data and conclusions of this work.

A quotation from Lombroso's opening speech at the Sixth Congress of Criminal Anthropology at Turin in April, 1906, will give the key to the first stage in the development of this theory: "In 1870 I was carrying on for several months researches in the prisons and asylums of Pavia upon cadavers and living persons, in order to determine upon substantial differences between the insane and criminals, without succeeding very well. Suddenly, the morning of a gloomy day in December, I found in the skull of a brigand a very long series of atavistic anomalies, above all an enormous middle occipital fossa and a hypertrophy of the vermis analogous to those that are found in inferior vertebrates. At the sight of these strange anomalies, as a large plain appears under an inflamed horizon, the problem of the nature and of the origin of the criminal seemed to me resolved; the characters of primitive men and of inferior animals must be reproduced in our times. And many facts seemed to confirm this hypothesis, above all the psychology of the criminal; the frequency of tattooing and of the professional slang; the passions as much more fleeting as they are more violent, above all that of vengeance; the lack of foresight which resembles courage and courage which alternates with cowardice, and idleness which alternates with the passion for play and activity."¹

¹ In the *Archives d'anthropologie criminelle*, Lyons, June, 1906.

His first conception of the criminal which was greatly modified later on, was as an atavistic phenomenon reproducing a type of the past. In order to find the origin of this atavistic phenomenon he goes back not only to savage man but also to animals and even to plants.

Crime and criminals are, strictly speaking, human phenomena and are, therefore, not to be found outside of the human race. But when a criminal displays a strong instinct for crime based upon physiological and psychological characteristics of a low order it is necessary to search in the lower species for characteristics which correspond to those of the criminal. The acts which result from these characteristics Lombroso calls the equivalents of crime. Among plants he finds such equivalents in the habits of the insectivorous plants. It is questionable, however, if the so-called "murders" of insects by these plants can be considered as equivalents of crime since they are committed by one species against another and belong in the same category with man's habit of eating animals and plants. But among animals are to be found veritable equivalents of crime in acts contrary to the general habits and welfare of a species by one of its members. Cannibalism, infanticide and parricide frequently occur, while murder, maltreatment and theft are used to procure food, to secure command and for many other reasons. In the past the idea of crime committed by animals has been so strong that in ancient times and in the Middle Ages animals were frequently condemned accord-

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ing to juridical forms for acts harmful to man. Various causes for these equivalents of crime among animals have been noted, as, for example, congenital anomalies of the brain. Veterinary surgeons recognize these anomalies and give them as causes for the misbehavior of horses. Other causes are antipathy causing murder, old age resulting in ill temper, sudden anger, physical pain, etc.

Not only the equivalents of crime but those of punishment also have been noted among the lower species. Many cases are on record of a group of animals having torn to pieces one of its members who had committed an act contrary to the welfare of the group or had failed in performing its duties towards the group. In this blind act of vengeance we see the embryo of the form of social reaction called punishment.

There are, also, many characteristics of the lower species which, because they are natural and normal to them, cannot be called the equivalents of crime, but which when reproduced by atavism among civilized men become criminal. The same is true of many characteristics of savages. For example, homicide is frequently practised under social sanction, such as infanticide, murder of the aged, of women, and of the sick, religious sacrifices, etc., while cannibalism is prevalent in many tribes. Theft also exists under social sanction though it is not so common, because the institution of private property is not highly developed among savages. The veritable crimes among the savages are those against usage in which an established custom or

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religious rite is violated. These crimes aroused vengeance which was at first private and then religious and juridical.

In like manner as among the savages characteristics are to be found in the child in a normal fashion which would be criminal in an adult, such as anger, vengeance, jealousy, lying, cruelty, lack of foresight, etc. For the first year or more of its life a child lacks a moral sense and its development is determined largely by its surroundings. There are, furthermore, many abnormal children in whom a tendency to crime manifests itself early. Among { seventy-nine children under eleven years of age confined in houses of correction, Lombroso found only seven who had nothing abnormal in their constitution. Twenty-seven out of fifty-nine about whose heredity information could be obtained had an abnormal heredity.

These few citations with regard to the characteristics both normal and abnormal of the lower species, savages and children indicate how abnormal is the heredity of many criminals. Lombroso now proceeds to the study of the constitution which the criminal inherits, of which study only the briefest summary can be given here.

The first series of these characteristics is the anatomical. The study of three hundred and eighty-three skulls of criminals gives him the results which he sums up in the following words: "On considering the results that these 383 skulls give us it is found that the lesions most frequent are: great prominence of the superciliary arches,

58.2% ; anomaly in the development of the wisdom teeth, 44.6% ; diminution of the capacity of the skull, 32.5% ; synostosis of the sutures, 28.9% ; retreating forehead, 28% ; hyperostosis of the bones, 28.9% ; plagiocephaly, 23.1% ; wormian bones, 22% ; simplicity of the sutures, 18.4% ; prominence of the occipital protuberance, 16.6% ; the middle occipital fossa, 16% ; symbolic sutures, 13.6% ; flattening of the occipital, 13.2% ; osteophytes of the clivus, 10.1% ; the Inca's or epactal bone, 10.5%." ¹ A union of many of these anomalies is to be found in the same skull in a proportion of 43%, while 21% have single anomalies. But these figures would have little value if not compared with corresponding figures for non-criminals. Such a comparison results in destroying the significance of some of these anomalies, since they prove to exist in about the same proportion among the latter. "But there are others, on the contrary, which are present in a double or triple proportion in the criminals. Such are, for example, sclerosis, the epactal bone, asymmetry; the retreating forehead, exaggeration of the frontal sinus and the superciliary arches, oxicephaly, the open internasal suture, anomalous teeth, asymmetries of the face, and above all the middle occipital fossa among males, the fusion of the atlas and the anomalies of the occipital opening."² Comparison with the skulls of the insane shows that criminals surpass the insane in most of the cranial anomalies. Comparison with savage and prehistoric skulls shows

¹ *Op. cit.* Vol. I, p. 155.

² *Op. cit.* Vol. I, p. 161.

the atavistic character of some of these anomalies. "Atavism, however, does not permit us to explain either the frequent obliquity of the skull and of the face, or the fusion and welding of the atlas with the occipital, or the plagiocephaly, or the exaggerated sclerosis, anomalies which seem to be the result of an error in the development of the foetal skull, or a product of diseases having slowly evolved in the nervous centers."¹ As to the significance of these cranial anomalies he says: "Is it possible that individuals afflicted with so great a number of alterations should have the same sentiments as men with a skull entirely normal? And note that these cranial alterations bear only upon the most visible modifications of the intellectual center, the alterations of volume and of form."²

A study of the convolutions of the brains of criminals reveals many anomalies of which he says: "It would be too rash to conclude that at last have been found with certainty anomalies peculiar to the cerebral circumvolutions of criminals; but it can very well be said already that in criminals these anomalies are abundant and are of two orders: some which are different from every normal type, even inferior, as the transverse grooves of the frontal lobe, found by Flesch in some cases, and so prominent that they do not allow the longitudinal grooves to be seen; others are deviations from the type, but recall the type of lower animals, as the separation of the calcarine fissure from the occipital, the fissure

¹ *Op. cit.* Vol. I, p. 168.

² *Op. cit.* Vol. I, p. 174.

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of Sylvius which remains open, the frequent formation of an operculum of the occipital lobe.”¹

The histology of the criminal brain also shows many anomalies due in most cases to arrested development. Anomalies of the skeleton, heart, liver, genital organs and stomach are also noted.

He then passes to the study of the anthropometry and physiognomy of five thousand nine hundred and seven criminals examined by himself and about a dozen other criminologists. In the anthropometric measurements it may be noted that the height usually reproduces the regional type, that the reach from fingertip to fingertip with the arms outstretched is usually superior to the height, an atavistic characteristic, frequent lefthandedness, the prehensile foot in which the great toe is mobile and is removed an unusually long distance from the other toes, another atavistic characteristic, precocious wrinkles, absence of baldness, a low and narrow forehead, large jaws, etc. In the physiognomy he discusses peculiarities of the hair, iris, ears, nose, teeth, etc., noting differences between different kinds of criminals. “In general, many criminals have outstanding ears, abundant hair, a sparse beard, enormous frontal sinuses and jaws, a square and projecting chin, broad cheek-bones, frequent gestures, in fact a type resembling the Mongolian and sometimes the Negro.”²

In summarizing the anatomical study of the criminal he says: “The study of the living, in short,

¹ *Op. cit.* Vol. I, p. 185.

² *Op. cit.* Vol. I, p. 222.

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confirms, although less exactly and less constantly, this frequency of microcephalies, of asymmetries, of oblique orbits, of prognathisms, of frontal sinuses developed as the anatomical table has shown us. It shows new analogies between the insane, savages and criminals. The prognathism, the hair abundant, black and frizzled, the sparse beard, the skin very often brown, the oxycephaly, the oblique eyes, the small skull, the developed jaw and zygomas, the retreating forehead, the voluminous ears, the analogy between the two sexes, a greater reach, are new characteristics added to the characteristics observed in the dead which bring the European criminal near to the Australian and Mongolian type; while the strabism, the cranial asymmetry and the serious histological anomalies, the osteomates, the meningitic lesions, hepatic and cardiac, also show us in the criminal a man abnormal before his birth, by arrest of development or by disease acquired from different organs, above all, from the nervous centers, as in the insane; and make him a person who is in truth chronically sick.”¹

The study of the anatomical characteristics of the criminal enabled him to separate the born criminal from the criminal of habit, of passion or of occasion who is born with very few or no abnormal characteristics. Leaving aside for the moment the latter classes of criminals he takes up the biological and psychological characteristics of the born criminal, the first being the psychological characteristic of tattooing. “One of the most characteristic traits

¹ *Op. cit.* Vol. I, p. 262.

of primitive man, or of the savage, is the facility with which he submits himself to this operation, surgical rather than esthetic, and of which the name even has been furnished to us by an Oceanic idiom."¹ By means of the statistics of 13,566 individuals of which 4,376 were honest, 6,347 criminal and 2,943 insane he shows that tattooing is quite common in some of the inferior classes of society but is most common among criminals. "It may even be said that, for these last, it constitutes on account of its frequency a specific and entirely new anatomico-legal characteristic."¹ He cites many causes for tattooing, such as religion, imitation, carnal love, vengeance, idleness, vanity, and above all atavism. "But the first, the principal cause which has spread this custom among us, is, in my opinion, atavism, or this other kind of historic atavism called tradition. Tattooing is in fact one of the essential characteristics of primitive man and of the man who is still living in a savage state."²

After noting peculiarities of the molecular exchange as indicated in the temperature, pulse and urine he discusses the general sensibility of the criminal. "The special taste of criminals for a painful operation so long and so full of danger as tattooing, the large number of wounds their bodies present, have led me to suspect in them a physical insensibility greater than among most men, an insensibility like that which is encountered in some insane persons and especially in violent lunatics."³

¹ *Op. cit.* Vol. I, p. 266.

² *Op. cit.* Vol. I, p. 295.

³ *Op. cit.* Vol. I, p. 310.

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Numerous experiments have revealed obtuseness in the sensibility of many parts of the body. Peculiarities have been noted in the visual acuteness and visual field, in the smelling, the taste and the hearing, in the motility, in the reaction to various external influences, and in the vaso-motor reflexes. "From all of these facts it could be deduced that nearly all the different kinds of sensibility, tactile, olfactory and of the taste are obtuse in the criminal; even in the occasional criminal as compared with the normal man; while in the criminal as in the insane and the hysterical, the sensibility to metals, to the magnet and to the atmosphere is exaggerated. Their physical insensibility recalls quite forcibly that of savage peoples, who can face, in the initiations to puberty, tortures which a man of the white race could never endure."¹

From this study showing the marked analgesia of the criminal he passes to his affective sensibility. "In general, in criminal man, the moral insensibility is as great as the physical insensibility; undoubtedly the one is the effect of the other. It is not that in him the voice of sentiment is entirely silent, as some literary men of a low order suppose; but it is certain that the passions which make the heart of the normal man beat with the greatest force, are very feeble in him. The first sentiment which is extinguished in these beings is that of pity for the suffering of another, and that is just because they themselves are insensible to suffering."²

He then discusses various psychological char-

¹ *Op. cit.* Vol. I, p. 346.

² *Op. cit.* Vol. I, p. 356.

acteristics of the criminal, showing his instability, vanity, vengefulness, cruelty, love for wine and gambling, lasciviousness, laziness, lack of foresight, etc. He shows that his intelligence varies greatly among the different classes of criminals. He discusses at some length the *argot* or professional slang of criminals. "Atavism contributes more to this than any other thing. They talk differently from us because they do not feel in the same way; they talk like savages because they are veritable savages in the midst of this brilliant European civilization."¹ In a similar manner he studies the hieroglyphics, writing and literature of criminals.

Having described the character of the born criminal in his first volume, Lombroso takes up in the second volume certain analogies with the born criminal, and then deals with the other classes of criminals. And first he deals with the analogy and indeed the identity which, he believes, exists between congenital criminality and moral imbecility. "The characteristics of the born criminal that we have studied in the first volume are the same as those of the moral imbecile."² Under the name of the moral imbecile, psychiatrists have classified the insane whose most prominent pathological characteristic is an absence of the moral sense.³ The famous English alienist, Henry Maudsley, has described this class, in the following words: "Notwithstanding prejudices to the contrary, there is a disorder of

¹ *Op. cit.* Vol. I, 497.

² *Op. cit.* Vol. II, p. 1.

³ Dallelman: *Théories de la criminalité*, p. 64, Paris, 1896.

the mind in which, without illusion, delusion, or hallucination, the symptoms are mainly exhibited in a perversion of those mental faculties which are usually called the active and moral powers—the feelings, affections, propensities, temper, habits, and conduct. The affective life of the individual is profoundly deranged, and his derangement shows itself in what he feels, desires, and does. He has no capacity of true moral feeling; all his impulses and desires, to which he yields without check, are egoistic; his conduct appears to be governed by immoral motives, which are cherished and obeyed without any evident desire to resist them. There is an amazing moral insensibility. The intelligence is often acute enough, being not affected otherwise than in being tainted by the morbid feelings under the influence of which the persons think and act; indeed they often display an extraordinary ingenuity in explaining, excusing, or justifying their behavior, exaggerating this, ignoring that, and so coloring the whole as to make themselves appear the victims of misrepresentation and persecution. Their mental resources seem to be greater sometimes than when they are well, and they reason most acutely, apparently because all their intellectual faculties are applied to the justification and gratification of their selfish desires. One cannot truly say, however, that the intellect is quite clear and sound in any of these cases, while in some it is manifestly weak.¹ Such a person may very easily

¹ *Responsibility in Mental Disease*, London, 1874, pp. 171-172.

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become a criminal. "A person who has no moral sense is naturally well fitted to become a criminal, and if his intellect is not strong enough to convince him that crime will not in the end succeed, and that it is, therefore, on the lowest grounds a folly, he is very likely to become one."¹

These moral imbeciles, however, vary greatly among themselves with regard to their other faculties and therefore do not form a uniform type. It has, therefore, been questioned whether moral imbecility is a morbid entity and whether it is not only, as Baer has said, a symptom common to various cerebral diseases. Lombroso, however, apparently regards it as such an entity, for he identifies it with the born criminal whom he considers a distinct type. He cites a good deal of evidence in support of this identification. "One of the things which prove indirectly the identity of moral imbecility and of crime, and which at the same time explain to us the doubts with which the alienists have been possessed up to this day, is the extreme rarity of the first in the insane asylums, and its great frequency, on the contrary, in the prisons."² After supporting this statement with statistics he demonstrates many likenesses between the moral imbecile and the born criminal, with regard to the weight, the skull, the physiognomy, analgesia, tactile sensibility, tattooing, vascular reaction, affectibility, etc. By contending that there is an identity between the moral imbecile and the born criminal he does not, of course, mean that every moral imbecile is a criminal. For

¹ Maudsley: *Op. cit.* p. 58.

² *Op. cit.* Vol. II, pp. 3-4.

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that matter not every person born with a criminal temperament becomes a criminal, for external circumstances may resist and overcome the innate criminal tendencies. But he believes that in physical constitution and mental characteristics the two are fundamentally alike.

This identity of the moral imbecile with the born criminal is, he believes, still more conclusively proved by a similar likeness which he finds between the criminal and the epileptic. "The objection has justly been made against this fusion that the cases of true moral insanity that I have been able to study are too restricted in number. That is true; but it is after all very natural; for, precisely because moral imbeciles are born criminals, they are not found as frequently in the asylums as in the prisons; and it is also for that reason that it is not easy to establish a comparison. But there exists in epilepsy a uniting bond much more important, much more comprehensible, which can be studied upon a great scale, that unites and bases the moral imbeciles and the born criminals in the same natural family."¹

As in the case of the analogy between the moral imbecile and the born criminal he demonstrates many likenesses between the epileptic and the born criminal in height, weight, the brain, the skull, the physiognomy, the flat and prehensile foot, the sensibility, the visual field, motility, tattooing, etc. "Criminality is therefore an atavistic phenomenon which is provoked by morbid causes of which the fundamental manifestation is epilepsy. It is very

¹ *Op. cit.* Vol. II, pp. 49-50.

true that criminality can be provoked by other diseases (hysteria, alcoholism, paralysis, insanity, phrenastenia, etc.) but it is epilepsy which gives to it, by its frequency, by its gravity, the most extended basis."¹

But while all born criminals are epileptics not all epileptics are born criminals. In all three, congenital criminality, moral imbecility and epilepsy, we find the irresistible force which results in crime or similar irresponsible acts. "The perversion of the affective sphere, the hate, exaggerated and without motive, the absence or insufficiency of all restraint, the multiple hereditary tendencies, are the source of irresistible impulses in the moral imbecile as well as in the born criminal and in the epileptic."²

These two analogies between the born criminal and the moral imbecile and the epileptic, mark the second stage in the development of his theory. "The studies which form the first part of this volume accord admirably with those which have been developed in the second and third of the first volume to make us see in the criminal a savage and at the same time a sick man."³ In other words he no longer sees in the born criminal only an atavistic return to the savage, but also arrested development and disease, thus making the born criminal both an atavistic and a degenerate phenomenon.

He now passes to the treatment of the classes of criminals other than the born criminal. The first of these is the criminal by passion. "Among the

¹ *Op. cit.* Vol. II, p. 120.

² *Op. cit.* Vol. II, p. 125.

³ *Op. cit.* Vol. II, p. 135.

criminals there is a category which is distinguished absolutely from all the others; it is this of the criminals by passion who ought rather to be called criminals by violence because as we have seen and as we shall see better still in their etiology, all these crimes have for substratum the violence of some passion."¹ These criminals are quite rare, are usually young, have few anomalies of the skull, a good physiognomy, honesty of character, exaggerated affectibility as opposed to the apathy of the born criminal, and frequent repentance after the crime, sometimes followed by suicide, or reformation in the prisons. A larger percentage of them are women than among other criminals. "The passions which excite these criminals are not those which rise gradually in the organism as avarice and ambition, but those which burst unexpectedly as anger, platonic or filial love, offended honor; which are usually generous passions and often sublime. On the other hand those which predominate in ordinary criminals are the most ignoble and the most ferocious as vengeance, cupidity, carnal love and drunkenness."² But in them as in ordinary criminals are found sometimes traces of epilepsy and impulsive insanity shown by the impetuosity, suddenness and ferocity of their crimes. The frequency of suicide among criminals by passion also indicates a pathological state of mind.

A special kind of criminals by passion are the political criminals. "In nearly all the political criminals by passion we have noticed an exaggerated

¹ *Op. cit.* Vol. II, p. 153. ² *Op. cit.* Vol. II, pp. 165-166.

sensibility, a veritable hyperesthesia, as in the ordinary criminals by passion; but a powerful intellect, a great altruism push them towards ends much higher than those of the latter: it is never wealth, vanity, the smile of woman (even though often eroticism is not lacking in them as in Garibaldi, Mazzini, Cavour) which impel them, but rather the great patriotic, religious, scientific ideals.”¹

Statistics show a much higher proportion than the average of insane persons among criminals and, therefore, Lombroso deals next with the insane criminals, as a special class of criminals. “A study made upon 100 insane criminals, chosen by preference among those who had become insane before the crime, with the exception of the epileptics, has shown to me the frequency of the criminal type (that is to say, the presence of five to six characteristics of degeneracy, and especially, outstanding ears [*oreilles à anse*], frontal sinuses, a voluminous jaw and zygoma, a ferocious look or strabism, a thin upper lip) in the proportion of 44%.”² This fact, however, does not lead him to identify the insane criminal with the born criminal, but he finds numerous analogies between the two in the weight, height, skull, tattooing, etc., and also many psychological analogies in the manner of committing a crime. He connects certain kinds of crime with certain kinds of insanity. “I have just mentioned the existence of certain kinds of insanity which reproduce each of the sub-species of criminality, so that to the juridical figure of incendiarism, of homicide, can

¹ *Op. cit.* Vol. II, p. 217.

² *Op. cit.* Vol. II, p. 254.

be opposed the psychiatric figure of pyromania, homicidal monomania, paradoxical sexuality, etc.”¹ Thus he opposes to the juridical figure of theft the psychiatric figure of kleptomania; to habitual drunkenness, dipsomania; to rape and pederasty, sexual inversion; to crimes of lust, satyriasis and nymphomania; to idleness and vagabondage, neurasthenia. He then discusses the psychological differences between the born criminal and the insane criminal with respect to the different kinds of mental malady and to the differences in the motives for crimes and the manner of committing them. He finishes the study of the insane criminal with the study of three special kinds, the alcoholic criminal, the hysterical criminal and the criminal mattoid.

The last part of his work is devoted to the occasional criminal. Of this study he says: “If I have been forced to delay for several years the publication of this book it has been on account of this part in particular, for, although in possession of numerous documents, direct contact with the facts failed me in the measure that I was trying to approach myself to them. The abundance of the facts also, their excessive variety constituted for me a cause of uncertainty which prevented me from reaching a conclusion.”² The first group with which he deals is that of the pseudo-criminals. These criminals are those who commit crimes involuntarily, who commit acts which are not perverse or prejudicial to society but which are called crimes by the law, who commit crimes under very

¹ *Op. cit.* Vol. II, p. 290.

² *Op. cit.* Vol. II, p. 463.

extraordinary circumstances, such as for the defense of the person, of honor, or for the subsistence of a family. These crimes are "rather juridical than real because they are created by imperfections of the law more than by those of men; they do not awaken any fear for the future, and they do not disturb the moral sense of the masses."¹

The next group is that of the criminaloids. "Here the accident, the all-powerful occasion draws only those who are already somewhat predisposed to evil."² The occasions out of which these crimes arise are the temptation to imitate, the constant opportunities offered by the commercial profession for fraud, abuse of confidence, etc., the associations of the prison, a passion less intense than in the criminal by passion which draws an honest man slowly to crime, the criminal couple the stronger member of which having evil tendencies perverts the weaker, epidemic allurements, etc. "These are individuals who constitute the gradations between the born criminal and the honest man, or, better still, a variety of born criminal who has indeed a special organic tendency, but one which is less intense, who has therefore only a touch of degeneracy; that is why I will call them *criminaloids*. But it is natural that in them the importance of the occasion determining the crime should be decisive while it is not so for the born criminal for whom it is a circumstance with which he can dispense and with which he often does dispense, as, for example, in

¹ *Op. cit.* Vol. II, p. 484.

² *Op. cit.* Vol. II, p. 485.

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cases of *brutal mischievousness*.”¹ And this position of the criminaloid between the born criminal and the honest man is in harmony with all natural phenomena “where the most striking phenomena are in continuity with a series of analogous phenomena less accentuated,”² just as in the moral sphere we have genius, talent, intelligence, etc., and in the pathology of degeneracy, the cretin, the cretinous, the sub-cretin, the idiot, the mattoid, the imbecile, etc.

The third group of occasional criminals is that of the habitual criminal. “The greatest number of these individuals is furnished by those who—normal from birth and without tendencies or a peculiar constitution for crime—not having found in the early education of parents, schools, etc., this force which provokes, or, better said, facilitates the passage from this physiological criminality—which we have seen belongs properly to an early age—to a normal, honest life, fall continually lower into the primitive tendencies towards evil.”³ So that these individuals without an abnormal heredity are led not by one circumstance offering the occasion for crime but by a group of circumstances conditioning their early life into a career of crime.

Associations of criminals such as those of brigands, the mafia and the camorra in Italy, and the “black hand” in Spain, etc., contain many members drawn into crime by their associates. In the classes in which on account of wealth, power, etc., the

¹ *Op. cit.* Vol. II, p. 512.

² *Op. cit.* Vol. II, p. 513.

³ *Op. cit.* Vol. II, p. 534.

conditions are against the commission of crime the criminal tendencies of those born with such tendencies remain latent or manifest themselves in other ways. Finally there is a class of epileptoids in whom there is a substratum of epilepsy which sometimes forms the basis for the development of criminal tendencies.

In the first edition of his work Lombroso gave excessive weight to his anatomical and anthropometric data which was not very surprising, since they were the most obvious and the most easily obtainable. This excessive emphasis laid upon the anatomical characteristics of the criminal led him to distinguish but one type—the criminal as an atavistic phenomenon. This immediately called forth the charge of unilaterality and the idea still exists that Lombroso recognizes but one type of criminal who is the result of a single cause, namely, atavism. But the brief summary of his work which I have given is sufficient to disprove this.

We have seen that in addition to studying the anatomical characteristics of the criminal he makes a lengthy study of his biological and psychological characteristics. He has rejected in part the atavistic theory of crime, no longer considering atavism as the only cause of crime and has adopted the theory of degeneracy as one of the causes. "In this edition I have demonstrated that in addition to the characteristics truly atavistic there are acquired and entirely pathological characteristics; facial asymmetry, for example, which does not exist in the savage, strabism, inequality of the ears, dischromatopsy,

unilateral paresia, irresistible impulses, the need of doing evil for the sake of evil, etc., and this sinister gaiety which is noticeable in the professional slang of criminals, and which, alternating with a certain religiousness, is found so often in epileptics. There may be added meningitis and softening of the brain which certainly do not result from atavism."¹

In his studies of moral imbecility and epilepsy he has demonstrated the analogies between these two and congenital criminality and though his identification of the moral imbecile with the born criminal and of the born criminal with the epileptic may be disproved his demonstration of the pathological likenesses of the three to each other is incontestable. In his study of the insane criminal he has exposed the characteristics of another very abnormal criminal type. He has demonstrated the abnormality of certain of the criminals by passion who, however, do not constitute a distinct criminal type. In the criminaloid he has shown a criminal partially abnormal who, however, will not commit a crime until a good opportunity presents itself. The habitual criminal though born without criminal tendencies has them developed in him by the circumstances of his early life. Finally, in some of the criminals by passion and in the pseudo-criminals we find entirely normal persons who have committed crime under very exceptional circumstances. Thus we see how very synthetic is his study of the anthropological characteristics of the criminal, since

¹ *Op. cit.* Vol. I, pp. XI-XII.

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it ranges from the most abnormal to the perfectly normal and there borders upon the study of the social causes of crime which he takes up at great length in a third volume.¹

What then is the significance of this study of the criminal by Lombroso and the other criminal anthropologists who have been stimulated by him and who have in turn helped him? They have shown that a large number of criminals are not normal, many of them being very abnormal. They have distinguished between the different anthropological types of criminals. They have shown that the study of anthropology, medical science, psychology and psychiatry is necessary to understand the criminal. The practical significance of their work for the treatment of criminals is obvious. For the rational treatment of the criminal it is necessary to be acquainted with these sciences in order in the first place to distinguish the criminal from normal and honest persons and in the second place to determine the specific type and character of each criminal. A system of criminal procedure which will make possible such treatment is the subject of study in this book.

Lombroso begins his work with the direct study of the criminal. Assuming that the criminals in the penitentiaries were fairly representative of the criminal class he carried on his anatomico-biological study among them, supplementing this study with frequent comparative studies in other classes of society. Garofalo, another of the three founders

¹ C. Lombroso: *Le crime*, Paris, 1907.

of the new science of criminology, starts out from a different point, though arriving at similar conclusions. Since he is a jurist he begins with the conception of a crime, but his conception is not the juridical one. "I think that the point of departure should be the sociological conception of *crime*. But we may be told that this is a juridical conception, and that, consequently, the jurists alone have the right to establish it. We are not concerned here with a technical word, but with a word which expresses an idea accessible to everyone whether he is or is not acquainted with the law. The legislator has not created this word; he has borrowed it from the popular language; he has not even defined it, he has only gathered together a certain number of acts, which, according to him, are crimes."¹

Crime is, therefore, not an artificial thing created by the law but a natural phenomenon. "It is in a word the *natural offense* (*délit naturel*) that we must establish in giving, of course, to the word '*natural*' the meaning of what is not '*conventional*,' of what exists in human society independent of the circumstances and exigencies of a given epoch, or of the ideas peculiar to a legislator."² But this conception of the "natural offense" does not mean that there is a group of acts which have always been considered criminal. History disproves this, for it shows us how much the acts considered criminal have varied in different ages. In order, therefore, to obtain a conception of the "natural

¹ R. Garofalo: *La criminologie*, Paris, 1905, p. 2.

² *Op. cit.* pp. 2-3.

offense" it is necessary to change the method, to abandon the analysis of deeds and to undertake that of feelings. "Crime, in fact, is always a harmful act which, at the same time, wounds some of those feelings which it has been agreed to call the moral sense of a human aggregation."¹ These feelings are, in his opinion, pity and probity. "The element of immorality necessary in order that a harmful act should be considered as criminal by public opinion is the violation of that part of the moral sense which consists of the fundamental *altruistic* feelings, *pity* and *probity*. It is necessary, further, that the violation should wound, *not the superior and most delicate part* of these feelings, but *the average measure in which they are possessed by a community*, and which is *indispensable* for the adaptation of the individual to society. That is what we shall call crime or *natural offense*."² This he says, is not a complete definition but it indicates the distinction between crime and other forms of immorality, namely, those that contain no cruelty or improbity.

The necessity which he has signalized of abandoning the analysis of deeds and undertaking the analysis of feelings requires the direct study of the criminal, in order, in the first place, to determine if there are psychic types of men which correspond to the classes of crime indicated, namely, those manifesting an absence of pity and those manifesting an absence of probity, and, secondly, in order to determine in the case of each criminal whether this

¹ *Op. cit.* p. 5

² *Op. cit.* p. 36.

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anomaly is irreducible on account of the complete absence of one or both of these feelings, or whether they still exist in an enfeebled state so that the anomaly may be attenuated by a change in the conditions of existence which will render the individual better adapted to social life. A review of the data of criminal anthropology leads him to the conclusion that the existence of a distinct anthropological criminal type has not yet been proved. "What criminal anthropology really lacks is the incontestable proof that any characteristic of the skull or of the skeleton is found much more frequently among criminals than among people presumably honest."¹ But though this type may not exist he believes that in every criminal there exists an inherent tendency towards crime, "that there exists always in the instincts of the true criminal a peculiar element, congenital or hereditary, or acquired during his childhood and become inseparable from his psychic organism. The fortuitous criminal does not exist if by this word it is meant that a man morally well organized can commit a crime by the sole force of exterior circumstances."² The criminal is, therefore, an anomaly among human beings. He discusses atavism and degeneracy as causes of this anomaly always laying the largest amount of stress on the psychological characteristics of the criminal and reaches the conclusion that the typical criminal is a "monster in the psychic order, having regressive traits which take him back to inferior animality; the incomplete, inferior criminals have a psychic

¹ *Op. cit.* p. 78.

² *Op. cit.* p. 102.

organization with traits which bring them close to savages.”¹ Thus as emphatically as Lombroso, Garofalo insists upon the necessity of studying the criminal. “These cases of exaggerated anomaly are revealed by the very circumstances of the offense, while in the cases less evident the nature of the criminal cannot be determined without anthropological and psychological observation; so that science is called upon to render much greater services to classify the inferior criminals.”²

Lombroso and Garofalo, as we have seen, devote most of their attention to the study of the criminal. The third of the founders of the new science of criminology, Enrico Ferri, is much more synthetic in his treatment of criminological problems. Speaking of the new science he says, “our school has made of it a science of positive observation which, supporting itself upon anthropology, psychology, criminal statistics, as upon penal law and penological studies, becomes this synthetic science which I myself have called ‘criminal sociology’.”³

It may be contended that this “synthetic science” is criminology of which criminal sociology is but one part. This, however, is a question of terms and under this title Ferri has given us the best treatment which has yet been made of the social aspects of crime. But he starts out by emphasizing as strongly as Lombroso and Garofalo the importance of criminal anthropology which he defines as the “*natural history of criminal man.*”⁴ The difference

¹ *Op. cit.* p. 120.

² *Op. cit.* p. 121.

³ E. Ferri: *La sociologie criminelle*, Paris, 1905, p. 40.

⁴ *Op. cit.* p. 48.

and the relation between the two are as follows: "For the criminal sociologist, these data (of criminal anthropology), which are for the anthropologist the point of arrival, are only the point of departure from which to arrive at conclusions juridico-social which are outside of the peculiar competency of the anthropologist. So that it can be said that criminal anthropology is to criminal sociology what the biological sciences, whether descriptive or experimental, are to the clinic."¹ He offers no original contributions to criminal anthropology in this work (though he has done so in his work on homicide) but he devotes his attention at first to the refutation of the principal criticisms which have been made of its methods and conclusions in order to prove that it provides criminal sociology with a substantial basis.

The first criticism made of the method used in the study of criminals was the small number of individuals examined. This criticism has already been renounced. In 1893 Lombroso was able to collect the records of the examination of fifty-four thousand criminals, insane and normal individuals and the number has greatly increased since then. Furthermore most of the biological data of great importance are subject to the least variations, "for example, if the length of arms can vary from one man to another by several centimeters, on the other hand the width of the forehead can vary only by a small number of millimeters. From whence this evident consequence that, in anthropological re-

¹ *Op. cit.* p. 52.

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searches, the necessity of large numbers is in direct ratio with the variability of the characteristics studied, or in inverse ratio with their biological importance.”¹

A second criticism made of the method used in the study of criminals has been of the comparison between criminals and normal persons either because of the difference of number in the two series of individuals examined or because of the difference in their personal conditions. He disproves this criticism by showing the approximate equality in the number of criminals and the number of normal individuals examined and by showing that comparison has usually been made between criminals and non-criminals of the same class.

Objection has been made to the scientific presuppositions of criminal anthropology by means of which it takes for basis the general inductions of the natural and biological sciences. But to make this objection is to deny the law of evolution which proclaims the continuity of social and moral phenomena with biological and other natural phenomena and necessitates the search for the origin of social and moral phenomena in these other sciences. To the different points of this objection, namely, that there is no relation between the physical and moral constitution of man, that there is no genetic relation between organs and functions, and that there is no relation between the brain, the mind and morality, Ferri makes specific replies.

It has been contended that disagreements both

¹ *Op. cit.* pp. 59-60.

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quantitative and qualitative exist in the data of criminal anthropology. In the first place such disagreements are bound to exist in any science in which the complexity of the phenomena studied is increasing rapidly. "Why, therefore, should this disagreement in *partial* results be a sentence of death for criminal anthropology alone, which is in this respect neither more nor less culpable than every other biological science, and which is only in its beginnings?"¹ He shows that many of these disagreements have resulted from faults in the methods of some anthropologists and that they are rapidly disappearing. The objection that there is a qualitative disagreement between organic evolution and psychic evolution is, in the first place, as has been shown above, a denial of the general law of evolution and furthermore has arisen out of a partial study of the data of criminal anthropology.

It is objected that "the anomalies, above all of an organic nature, are encountered not only in criminals, but on the one hand in honest persons themselves, on the other hand in the insane who are not criminal, and in general in the degenerates."² It is true that frequently there is found in an honest individual one or a very few of the characteristics which are found in a greater number in criminals. But anthropologists are in accord that the significance of these anomalies "resides in the accumulation more or less great of these anomalies in the same individual."³ These anomalies in an honest person are often corrected by other anthropological

¹ *Op. cit.* p. 69.

² *Op. cit.* p. 75.

³ *Op. cit.* p. 77.

characteristics. Furthermore it sometimes happens, in accordance with the law of heredity, that the predominance of the two parents in the transmission of their characteristics, organic or psychic, is variable, that one of the two parents "should have transmitted the exterior abnormal forms, the other, on the contrary, the normal nervous and consequently psychic constitution."¹ It must also be remembered that some abnormal individuals are kept from crime by external circumstances, of others it is not certain that they will remain honest all their lives, while still others have committed crimes but have not been caught or their prison record is not known in society. "As to the second part of the objection, which is concerned with this fact that the anomalies of criminals are found also in the insane who are not delinquent and in degenerates in general, it is attached, as we shall soon see, to the opinion according to which congenital delinquency is only a branch of the trunk from which proceeds insanity, or is no other than one of the numerous forms of general degeneracy."²

The historical and anthropological indetermination of crime is another objection made against criminal anthropology. This objection is based on the historical fact that many acts once considered crimes are not considered so now and vice versa, and the question has been raised whether the anthropological characteristics of criminals have varied from age to age and from place to place. This objection has grown out of the incomplete and uni-

¹ *Op. cit.* p. 77.

² *Op. cit.* p. 80.

lateral conception of the new science of criminology which gives rise to the belief that the founders and adherents of this new science regard crime as the product of anthropological factors alone. And here Ferri introduces his classification of the causes of crime as the result of physical or telluric conditions, biological or anthropological factors and social conditions. These different series of factors vary greatly as the causes of the different kinds of crimes. It is a noticeable fact that the social factors have been most prominent in the classes of crimes which have not been permanent. "The historical indetermination of crime should not therefore be affirmed in a general and absolute manner for all crimes; it applies above all to those forms of crime (evolutive criminality) which are the peculiar product, more or less transitory, of peculiar social conditions."¹ On the other hand "the characteristics solely organic disclosed in criminals by criminal anthropology are much more striking and more frequent in these fundamental forms of criminality which are less subject to variations of the social surroundings."² Against the crimes committed by these criminals there has almost always been in the historical evolution of humanity some form of social reaction. The manner in which these crimes have been committed has varied but the organic and psychic anomalies which caused them have remained more or less the same, a fact which Ferri formulates in the following principle: "The social

¹ *Op. cit.* p. 83.

² *Op. cit.* p. 82.

environment (*milieu*) gives the form to the crime which has its basis in the biological factor."

In connection with these objections it is sometimes contended that the researches of criminal anthropology are not justifiable until "there has been determined, outside of the penal laws, which are variable, the boundaries between crimes and normal conduct, according to natural and social criterions."¹ This contention Garofalo has answered, as we have already seen, by his conception of the "natural offense" as opposed to the "legal offense" created by the law. But Ferri does not consider it necessary to start out with any preliminary definition. "In my opinion the definition, with which the metaphysicians and classical jurists always like to commence, can be, on the contrary, only the ultimate synthesis; it ought therefore to come at the end and not at the beginning of the researches of criminal sociology."² This certainly is more in accord with the positive scientific method and the scientists of the new school in their direct study of the criminal seem to be getting nearer to a permanent and stable definition of crime than have the jurists in their study of acts, the criminal character of which is constantly changing.

The substance of Ferri's answer to the objection that no criminal type exists will be given later on in a discussion of the criminal type.

The last objection he discusses is to the effect that there are divergencies in the scientific determination of the origin and of the nature of crimin-

¹ *Op. cit.* p. 85.

² *Op. cit.* pp. 85-86.

ality. It is true that numerous explanations and hypotheses have been made by criminologists. Among others are the following: that crime is a phenomenon of biological normality; of social normality; of biological abnormality by atavism, by neurasthenia, by epilepsy, by moral anomaly, etc.; of social abnormality by economic influences, by complex social influences, by juridical inadaptation. Each of these hypotheses Ferri subjects to a careful examination in order to get from each what it has to contribute towards a synthetic conclusion which he believes will give a complete expression for the phenomenon of crime. He resumes his examination of these hypotheses as follows: "each of these biological explanations of criminality is true in part; and I say in part because each of them is verified in reality more or less completely in this or that variety of each category. But no one of these hypotheses is sufficient or complete; first because no one of them suffices to explain the natural genesis of crime in all the categories of delinquents; in the second place because, even when it is in accord with the characteristics of this or that criminal type, it still does not give the precise and fundamental reason why, in certain individuals, such or such a condition of biological abnormality results in crime, while in others it results in insanity or suicide, or only an organic and psychic inferiority."¹ He then gives his own theory of the origin of crime in saying that every crime "is always the resultant, in every anthropological category of delinquents

¹ *Op. cit.* p. 122.

and in every individual of each category, as much of special abnormality, permanent or transitory, congenital or acquired, of the organic or psychic constitution, as of exterior circumstances, physical and social, which contribute, at a given time and place, to determine the action of a given man."¹ This theory brings him to the conception of crime as a phenomenon of biologico-social abnormality, "a phenomenon of complex origin, as much biological as physico-social, with modalities and degrees different according to the different circumstances of persons and things, of time and of place."²

The objections against criminal anthropology to which he has been replying he sums up as follows: "Unilaterality, this is the organic defect of all the objections made to the data of criminal anthropology; the critics have always wanted to suppose, for polemical convenience, that the new science considers crime as a phenomenon *solely and exclusively* biological, while, from the beginning, its founders, although separating provisionally, for imperious reasons of study, this or that phase of the phenomenon of crime, yet have always affirmed its complex natural determination, in the biological order as in the physical order and in the social order."³ The complexity of the causes of crime and in the kinds of crime which Ferri has signalized indicates a complexity in the kinds of criminals and he now proceeds to the classification of criminals. First comes the distinction between the two great categories of habitual criminals and of occasional

¹ *Op. cit.* p. 126.

² *Op. cit.* p. 134.

³ *Op. cit.* p. 136.

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criminals. This distinction he demonstrates by two orders of proof; first, the synthetic results of anthropological researches upon delinquents, second, statistical data on recidivation and the forms of delinquency. The anthropological researches show that from fifty to sixty per cent. of the criminals have only a few organic and psychic anomalies, that about a third have a very large number and that a tenth have none at all. A study of criminal statistics in different parts of Europe brings him to the conclusion that the recidivation in Europe usually ranges from fifty to sixty per cent. A further study of these figures according to the different kinds of crime committed, distinguishing the crimes characteristic of criminals with abnormal anthropological traits from those usually committed by occasional criminals, brings him to the conclusion that the former class of criminals exists in a proportion of from forty to fifty per cent. of the total, a figure which closely corresponds to the one given by Lombroso. "Therefore the statistics of general recidivation and of the different kinds of offenses confirm anew, in an indirect manner, the observation that in the total number of those who commit offenses a part only present these individual anomalies that anthropology has distinguished."¹

Having demonstrated this fundamental distinction between habitual criminals and criminals of occasion he gives his classification of criminals in the following five categories: *insane* criminals—

¹ *Op. cit.* p. 146.

born criminals—*habitual* criminals—*occasional* criminals—criminals *by passion*.

Of the different kind of insane criminals he mentions first the moral imbeciles whom, as we have seen, Lombroso very nearly identifies with the born criminal. Moral imbecility is, however, not the ordinary form of insanity. "Outside of the moral imbecile...there is a whole phalanx of wretched beings who are affected with a common form, more or less apparent, of mental infirmity, and who, in this pathological state commit offenses often atrocious, in the cases, for example, of idiocy, of the mania of persecution, of the mania of fury, of epilepsy, or of outrages against property and decency, for example in cases of general paralysis, of epilepsy, of imbecility, etc."¹ The forms of insanity which cause delinquency are so complex that it is impossible to unite them in a single formula. There are the delinquents belonging to the category which Maudsley has called "the intermediary zone" and which Lombroso has called "mattoid" who are neither completely insane nor entirely sane.

Next come the born criminals who belong to the anthropological type whose characteristics Lombroso has described in such great detail. "These are of the types of men either savage and brutal or crafty and lazy who cannot distinguish homicide, theft, crime in general, from honest industry, who are 'delinquents as others are good workmen,' who have about crime and punishment ideas and

¹ *Op. cit.* p. 154.

feelings entirely opposed to those that legislators and jurists suppose they have."² These are the criminals who consider the prison as an asylum where food and lodging is assured to them or at the most as the risk of their criminal industry, just as accidents of all sorts are the risks of honest trades. These are the ones who soon after leaving prison recidivate and thus return again and again to prison with a frequency which depends upon the character of their crimes "and against whom the legislator closing the eyes to everyday experience, persists in this useless and costly struggle between punishments which do not cause any fear and crimes repeated without cessation."

The third category of criminals is that of the habitual criminals. These individuals do not have or have only to a slight degree the anthropological characteristics of the born criminal. Their first crimes are caused less by congenital tendencies than by moral weakness and by the force of circumstances and of corrupt surroundings. But when once a crime has been committed, usually at an early age and almost always against property, they persist, especially when encouraged by the impunity which often follows their first offenses, in a criminal career which becomes for them a chronic habit and a veritable profession. "This results from the fact that detention in common has corrupted them morally and physically, or cellular imprisonment has stupefied them, alcoholism has brutalized them, and society abandoning them after

² *Op. cit.* p. 156.

as before their liberation to misery, to idleness, to temptations, has not aided them to struggle to re-enter the conditions of honest life.”¹ Precocity and recidivation are the two principal sociological characteristics of the habitual criminal. They are characteristics of the born criminal also but through different causes.

The criminal by passion or by transport of passion is an occasional criminal but with distinct constitutional traits which distinguish him from other occasional criminals. “These are individuals whose previous life has been without a stain, men of a sanguine or nervous temperament and of an exaggerated sensibility, as opposed to born and habitual criminals; they even have sometimes a temperament which partakes of that of an insane person or an epileptic and of which the criminal passion may be only a disguised manifestation. Most frequently (and these are frequently women) they commit the crime in their youth under the impulse of a passion which breaks out suddenly, as anger, baffled love, offended honor.”²

The occasional criminals are those “who have not received from nature an active tendency towards crime but rather those who fall into it pushed by the incitement of temptations that their personal circumstances or the physical and social conditions in which they live offer them, and who do not fall into it again if these temptations disappear.”³ But even in most of the occasional criminals there is a certain abnormality much less in degree than in the

¹ *Op. cit.* p. 158. ² *Op. cit.* p. 166. ³ *Op. cit.* p. 167.

born criminals which justifies Lombroso in calling them "criminaloids." Of the two conditions which psychically determine crime—moral insensibility and lack of foresight—the second is the principal one which determines the crime of occasion, while the first determines principally habitual and congenital delinquency. The social sense, the lack of which causes moral insensibility, may be very strong in the occasional criminal but it is not seconded by a sufficiently keen prevision of the consequences of crime and therefore yields to the exterior impulse without which it could have kept the individual in the path of honesty. There are, however, those whom Lombroso has called "pseudo-criminals" who are entirely normal and yet have committed crime involuntarily or have done acts causing no social damage and displaying no perversity but which nevertheless are considered criminal by the law.

This is Ferri's five-fold classification of criminals. He then takes up other classifications that have been suggested and discusses them. But he is careful to insist that neither in his classification nor in any other can the lines between the different classes be drawn with absolute exactitude. "The differences between these five classes of criminals are only differences of degree and modality, as much for the organic or psychic characteristics as for the co-operating factors of the physical and social surroundings. Just as there is no essential difference between the different groups of any natural classification, as in mineralogy, in botany, in zoölogy or

in general anthropology, so there is none between these groups of criminal anthropology.”¹ Such a classification has a practical utility not only in penitentiary administration but “this distinction should be for juridical science one of the principal norms upon which should be regulated, for considerations of quality and of degree, the social defense against crime; that is to say, it should be the fundamental datum of criminal sociology.”²

Having firmly established its basis in criminal anthropology Ferri now turns to the method and subject matter of criminal sociology itself. Its method must be somewhat different from that of criminal anthropology. “For social phenomena, as distinguished from physical and biological phenomena, if experimenting is very difficult and often impossible, observation is the means which is the best suited to scientific researches; and statistics furnish one of the most useful instruments for this observation.”³ By means of statistics is shown the intimate connection between crime and social conditions. They reveal in the individual elements of the social organism the fundamental causes of crime as a social phenomenon. They are of utility not only in scientific researches and inductions but also in practical legislative applications. As Lord Brougham said at the statistical congress at London in 1860, “criminal statistics are for the legislator what the map, the compass, and the sounding line are for the navigator.” Not until these social causes of crime have been determined and gauged can

¹ *Op. cit.* p. 171.

² *Op. cit.* p. 180.

³ *Op. cit.* p. 184.

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measures be intelligently taken to counteract them.

Ferri next takes up his classification of the causes of crime in the three categories of the anthropological, physical and social causes of crime. In the anthropological factors are included the organic and psychic constitution of the criminal, whose anomalies have been exposed by criminal anthropology, and the personal characteristics of the criminal including the biological conditions of race, age and sex, and the biologic-social conditions of the civil state, profession, domicile, education, etc. The physical or cosmo-telluric factors are the climate, the nature of the soil, the succession of days and nights, the seasons, the annual temperature, atmospheric conditions, etc. All of these have considerable influence on the manifestation of crime. The social factors come from the social environment of the criminal and include the density of the population, the state of public opinion and of religion, the constitution of the family and the system of education, the industrial production, alcoholism, the economic and political organization, the administration of justice and of the judicial police, etc. These conditions, combined and interwoven in the most complex fashion form the indirect and latent causes of crime.

Ferri then makes a study of the data upon the periodic movement of criminality in Europe which it is impossible to summarize here. This study leads to the formulation of the law of criminal saturation analogous to the law of chemical saturation. "As in a given volume of water, at a given

temperature, a determinate quantity of a chemical substance is dissolved; not one atom more and not one less, so in a given social sphere with given individual and physical conditions, there is committed a determinate number of crimes, not one more, not one less."¹ But this does not mean that, as is sometimes thought, the amount of crime from year to year is equal, that according to a fatal law each year must furnish its quota of crime. Since the physical and social conditions and the biological characteristics of the population vary from year to year the criminality must vary also and the extent to which the criminality of one year approximates the criminality of the next is determined by the extent to which the causes have remained constant. The amount of criminality is therefore governed by a dynamic regularity, but not a static regularity, since criminal phenomena depend upon natural causes and not upon fatalism or predestination. It is therefore possible to modify the effects to the extent that the causes can be modified.

He then proceeds to apply this law of criminal saturation to the penalties now inflicted, usually in the form of imprisonment, in order to determine to what extent these penalties reduce criminality by modifying its causes. After an extended study of the historical, statistical and psychological data with regard to this question he comes to the conclusion that "penalties, far from being this convenient panacea that they are generally considered

¹ *Op. cit.* p. 230.

by jurists, the classical legislators and by the public, have only a very limited power to combat crime.”¹ In view of the failure of punishment to prevent crime he turns his attention to what he calls the “equivalents” of punishment or changes in the conditions which cause crime. These changes will be principally in the social factors of crime, though they will have their effect indirectly on the biological factors also. The fundamental idea of these equivalents of punishment is “to give to the social organism such surroundings that human activity, instead of being vainly menaced with repression, should be guided continually in an indirect manner into paths which are not criminal and that a free scope should be offered to the energies and needs of the individual, whose natural tendencies will be opposed the least possible, who will be spared as much as possible the temptations to and opportunities for crime.”² Of these equivalents of punishment he mentions a large number in the following categories; economic, political, scientific, administrative, religious, educational; he mentions likewise those found in the family, and in connection with alcoholism, vagabondage and abandoned children.

These equivalents of punishment come entirely outside of the penal code. They are preventive measures used in the interest of social hygiene and are the most effective weapons for the social defense against crime. But as the conditions which cause crime will never disappear there will always have

¹ *Op. cit.* p. 267.

² *Op. cit.* p. 270.

to be a direct form of social defense against criminality which already exists. This direct form of social defense as embodied in the penal system should be a "clinic by which society will preserve itself from the disease of crime as it preserves itself from every other physical and mental disease."¹ When the disease is curable the attempt will be made to cure it. When, however, it is congenital and atavistic its victim will be eliminated in some way, in order to protect society.

In this way Ferri, taking the inductions of criminal anthropology as a starting point, builds up the science of criminal sociology in which are treated the social aspects of crime. It is in fact only one part of the general science of sociology. "Just as, in the organic order, upon the common foundation of general biology (science of individual life) physiology and pathology are distinguished, for the special study of normal or abnormal vital phenomena; so, in the super-organic order (as Spencer said with an idea perhaps inexact), upon the common foundation of general sociology (science of social life) we distinguish, for the special study of normal or abnormal social phenomena, on the one hand economic, juridical, political sociology, on the other hand criminal sociology."²

We have now reviewed the theories of the three founders of the new science of criminology. A number of other theories, which purport to explain congenital criminality entirely or in part, should be mentioned briefly.

¹ *Op. cit.* p. 315.

² *Op. cit.* p. 622.

One of the broadest and most general of these is the one which regards the criminal as a degenerate. Degeneracy is a very general biological phenomenon. It is characterized by a series of steps by means of which a family, a race, or a species which has attained a certain stage of evolution regresses to an extent more and more marked until in the last stages it reaches individual sterility which results in the extinction of the species. This biological phenomenon is common to all animal species and was first applied to man by Morel. He distinguished a special class of insane whom he called degenerate because he found in them a hereditary tendency towards sterility. This idea was taken up later and much developed by many scientists, among them Charcot, Magnan, Baer, Sergi, etc. Human degeneracy is now a recognized fact but its limits, causes and characteristics are still to a certain extent in dispute. The problem is made very difficult by the variety of individuals included in this group which extends from idiots to persons of high intelligence and even of genius who are somewhat unbalanced, all of them being on the road to extinction. These disputed questions cannot be discussed here. But as the data of criminal anthropology were accumulated, a striking similarity was observed between the characteristics of congenital criminals and those of degenerates. This similarity gave rise to the theory that the born criminal is a degenerate, which now has many partizans. As we have already seen, Lombroso himself has noted the similarities between degeneracy

and congenital criminality. Here is involved the disputed question as to whether or not atavism is a degenerate characteristic, those who deny this not being able to admit the identity with or extreme likeness to degeneracy of the criminal type in which atavism is so prominent.

Another theory regards the criminal as a neurasthenic. This theory arises out of two considerations, first, that some forms of neurasthenia are mono-symptomatic and, second, that analogies exist between the psychic states of certain cerebral neurasthenics and the psychic states of criminals. Neurasthenia is sometimes limited to the brain and causes characteristic disorders there. The cerebral neurasthenic lacks stable will power. His desires are fleeting though frequently violent. His acts are as mobile and variable as his thoughts. He dislikes work because it requires perseverance and frequently breaks away from the restraints of family life. All these characteristics make him more or less unadapted to social conditions. Benedikt was the first to contend that the criminal is a neurasthenic. The psychological anomaly of the criminal is, according to him, "a moral neurasthenia combined to a physical neurasthenia which is congenital or acquired in early infancy."¹ Its principal element is an aversion to work which comes from the nervous constitution. "If an individual from infancy has neither the force to resist sudden impulses nor the force to obey noble excitations, and,

¹ Quoted in the *Théories de la criminalité* of Dallemagne, Paris, 1896, p. 112.

especially, if this moral combat has for him the consequence of a painful feeling, then he represents a moral neurasthenic."¹ Vagabondage is one manifestation of this neurasthenia if there is necessity of gaining a livelihood. The neurasthenia may not result in crime but if a strong taste for some form of enjoyment exists, the desire to secure the means of satisfying this enjoyment may be too strong for the neurasthenic to resist and he will become a criminal.

A theory developed by Colajanni, an Italian criminologist, is that the criminal is a phenomenon of psychic atavism. Colajanni begins by criticizing and refuting the conclusions of criminal anthropology and especially the theory of physical atavism. This, he says, it would not be possible to admit, because it presupposes an ancestral type with the characteristics of criminals; but as most of these characteristics are incompatible with regular generation such a type could not exist. His own conclusion is that the criminal is an individual attainted with psychic atavism, which is the reversion of the member of a given race to the psychic characteristics of preceding stages in the evolution of the race. The superiority of this theory to that of physical atavism, he contends, is that it can be deduced from direct comparisons between savages who exist to-day and civilized criminals, from the analogy between criminals and children who reproduce the moral past of the race, and from the traits which are common to criminals and the lower

¹ *Op. cit.* pp. 112-113.

classes who are somewhat backward in their state of civilization. His criticisms involve a denial of the connection between the physical and moral character of man and many replies have been made to them, which cannot, however, be summarized here.

We will now pass to theories which explain the character of certain special classes of criminals. Criminals frequently appear in court who give the impression of children. These are infants who, according to Brouardel, constitute a special group of degenerates. They are not congenital degenerates but degenerates of development. Up to the age of puberty these infants are very precocious. They are alert, adroit and lively. The gamin of a great city is a good example. But at puberty anatomical and psychic changes take place. Anatomically the organs experience an arrest of development, they remain those of a young girl or boy. Psychically they become stupid and sluggish in their intelligence. In the men there is a tendency towards effemination of forms, and sterility.

The effeminates constitute another class that resembles that of the infants. They are, as Laurent has said, "beardless, with long eyelashes, thin hair, hips much developed, shrill voice. Their limbs are round like those of a woman, their muscles do not project in a pronounced manner under the skin, their contours take on a remarkable softness, their movements are full of suppleness and grace. Like the infants they are the most frequently

descendants of alcoholic and also, as Faneau de la Cour has shown, of tuberculous parentage.”¹

The seniles are the opposites of the infantiles. In them decrepitude comes before its time. Their evolution has taken place normally but their involution begins too soon. They become organically and functionally old before their time. Among criminals seniles are a less pronounced class than the infantiles and effeminate, but are sometimes found. All three of these classes are special varieties of degenerates, most of their characteristics being degenerate.

This variety of theories shows the complexity of the problem of criminality. It indicates the large number of forces which cause the criminal. To the study of these causes must be brought the aid of many sciences, among them biology, anthropology, the medical sciences, psychiatry, etc. It is evident that no unilateral theory can answer this problem but that a very broad and synthetic theory alone can serve this purpose.

The most contested idea in criminal anthropology and the one that has received the largest amount of discussion in books, congresses, etc., has been that of the criminal type. It may be worth while to review briefly this discussion at this point in order to indicate how far the conception of the criminal has been synthesized.

Though this idea of a criminal type had been suggested several times in the past, it was fully

¹ Quoted in the *Théories de la criminalité*, of Dallemagne, Paris, 1896, p. 175.

developed for the first time by Lombroso so that it will again be necessary to start our review with him. In the first part of this chapter we have summarized his conception of the born criminal who is for him a distinct criminal type. A quotation from his speech at the Congress of Criminal Anthropology at Turin in 1906 has shown that his early studies led him to regard the criminal as an atavistic type, as reproducing the characteristics of lower races. This theory, offered in his early works as an explanation of congenital criminal tendencies, was severely attacked on account of its unilaterality. These criticisms and his further researches led him, as we have seen, to modify this theory and to admit degeneracy as a cause of congenital criminality. He has even come to regard atavism as a form of degeneracy as where he speaks of the criminal type as "the presence of five or six characteristics of degeneracy and especially: outstanding ears (*oreilles à anse*), frontal sinuses, jaw and zygomas voluminous, a ferocious look or strabism, thin upper lip."¹ In this he has been supported by a writer on degeneracy. "It is to be seen therefore that a state of existence may be at the same time pathological, and, nevertheless, the simple return of a state of existence originally entirely healthy, and it has been a reprehensible thoughtlessness to accuse Lombroso of contradiction in seeing at the same time degeneracy and atavism in the criminal instinct. The unhealthy aspect of degeneracy consists precisely in the fact that the

¹ *L'homme criminel*, Vol. II, p. 254.

degenerate organism has not the power to ascend to the level of evolution already attained by the species, but stops on the way at some point situated more or less low.”¹ This view of atavism as a form of degeneracy has made Lombroso’s doctrine more catholic so that it is much easier to connect the criminal with the social and physical conditions out of which he has evolved. In order, therefore, to understand his present theory of the criminal type it is necessary to refer to the later editions of his work.

In the first place he discusses the character of a type in general. “In my opinion, one should receive the *type* with the same reserve that one uses in estimating the value of *averages* in statistics. When one says that the average life is 32 years and that the most fatal month is December, no one understands by that that everybody must die at 32 years and in the month of December.”² The type is, therefore, an abstract conception including the characteristics which are most common in a certain group of individuals. But this does not mean that every individual in the group must have all these characteristics. As Isidore G. Saint-Hilaire has said: “The type is a sort of fixed point and common center about which the differences presented are like so many deviations in different directions and oscillations varied almost indefinitely, about which nature seems to *play*, as the anatomists used to say

¹ Max Nordau: *Dégénérescence*, Paris, 1894, quoted in the introduction to *L’homme criminel*, Vol. I.

² *Op. cit.* Vol. I, p. IX.

formerly, and as is still said in Germanic languages."¹ Applying this general conception of a type, it is evident that every criminal representing this type need not have all its characteristics. In fact it is doubtful if any one criminal ever did have all these characteristics. As one of his principal adversaries, Topinard, has said: "The type of a series of skulls or of individuals, is not, therefore, a palpable reality, but the product of study, a desire, a hope, an abstract and general image, according to the expression of Goethe....The type of a species, of a race, of a people, of a series of skulls, in other words of any group whatsoever, is then the general effect of the characteristics the best attested, the most constant in the requisite degree, and the most striking in relation with those of other groups."² On the other hand it is possible for a person not representing a type to have one or a few of the characteristics of the type as, for example, Goethe, who had a retreating forehead, though by no means representing the criminal type. It is now evident that, in accordance with the general conception of a type, it is not necessary to prove the presence in each representative of the criminal type of all the characteristics of this type.

A second question is what percentage of criminals represent the criminal type. As we have already seen, Lombroso has placed this number at about forty per cent. The objection has been made that it is impossible to talk about a criminal type

¹ Quoted in *L'homme criminel*, Vol. I, p. 237.

² *Elements d'anthropologie générale*, Paris, 1885.

when sixty per cent. of the criminals do not represent it, to which he replies as follows: "But, in addition to the fact that the figure of forty per cent. is not to be disdained, the...insensible passage from one character to another manifests itself in all organic beings; it manifests itself even from one species to another; with more reason is it so in the anthropological field where the individual variability, increasing in direct proportion to improvement and to civilization seems to efface the complete type. It is difficult, for example, among one hundred Italians to find five who present the type of the race; the others have only fractions of it which manifest themselves only when they are compared with foreigners; and yet, there is no one who dreams of denying the Italian type."¹ As we have already seen, Lombroso has indicated many gradations among criminals according to their anthropological characteristics, showing that in the gradations in which these characteristics tend to disappear external forces are the principal causes of crime. Thus we see that his conception of the criminal type as it now stands is very carefully limited.

Ferri has replied at some length to the objections made against the criminal type. In his observations while studying the homicide he was frequently able to distinguish the homicides from other prisoners by means of their anthropological characteristics. On one occasion, while examining seven hundred soldiers, he distinguished one who

¹ *Op. cit.* Vol. I, p. IX.

presented the clear type of the homicide, "retreating forehead, enormous jaw, cold stare, cadaverous paleness, thin lips,"¹ and found out later that this soldier had been condemned for a murder committed during his childhood. The decisive marks are to be found in the physiognomy. "I must, however, note in this connection that the anthropological criminal type does indeed result from a mass of organic characteristics, but that the decisive traits are really the lines and the expressions of the physiognomy. The anomalies of the structure and of the bony frame of the skull and of the body are only the complement of this central nucleus which the physiognomy forms, and furthermore certain of its characteristics are, at least, according to my experience, more characteristic than the others, and these are the eyes and the jaw."² By means of these traits can be distinguished not only the homicide but the different kinds of thieves and other criminals. The reason for the predominating value of the physiognomy in the diagnosis of the criminal type is that "by the anomalies of the skull or of the skeleton alone can be distinguished only the degenerate or the abnormal in general from normal man, but not, by these indices alone, the criminal from the other degenerates."³ He then proceeds to a description of the criminal type as a predisposition for crime. "The individual who, from his birth, by hereditary transmission (as has been proved a thousand times for alternations of alcoholism,

¹ *La sociologie criminelle*, p. 96.

² *Op. cit.* p. 97.

³ *Op. cit.* p. 97.

of insanity, of moral insanity, of criminality, of sterility, in certain families affected with degeneracy), bears in his organic and psychic constitution this union of anomalies, is *predisposed to crime*.”¹ But this predisposition does not mean that the person who has it is absolutely certain of committing crime. To the objection of fatalism made against the criminal type Ferri replied at the Fourth Congress of Criminal Anthropology at Geneva in 1896 in the following words: “By the born criminal the Italian school has not understood and does not understand an anthropological type, characterized only by anatomical stigmata, which is inevitably forced to commit crimes, whatever may be the conditions in which it lives and acts. In the same manner there are born phthisics, that is to say, with a congenital and hereditary predisposition to phthisis and who may not die of phthisis if they have the good fortune to live in exceptionally favorable economic, hygienic, etc., conditions, who, however, cannot efface in the individual the characteristic traits of its anatomical and physiological constitution. So that by the born criminal the Italian school has always understood a man in whom the determining criminal influence is for the most part owing to the pathological, atavistic and teratological conditions of his physio-psychic personality, which make him a well characterized anthropological variety.”² It is the fact that these external influences are sometimes the preponder-

¹ *Op. cit.* p. 106.

² *Revue scientifique*, Paris, November 7, 1896.

ating causes of crime that has led Ferri to distinguish a bio-social type from the purely anthropological or biological type.

Garofalo lays most emphasis on the mental characteristics of the criminal. Though not opposing the existence of an anthropological criminal type, he is uncertain as to its existence. "What in reality is lacking to criminal anthropology is the incontestable proof that any characteristic whatsoever of the skull or skeleton is found much more frequently among criminals than among persons presumably honest."¹ But like Ferri, he lays great emphasis on the physiognomic characteristics of the criminal, going so far as to distinguish three physiognomic types, the *murderer*, the *violator*, and the *thief*.

The conception of the criminal type has been much attenuated since it was first presented by Lombroso. From the conception of a group of criminals consistently presenting certain characteristics coming from a single origin, it has become the conception of a group of criminals, each of whom has a considerable number of anomalous characteristics, which, however, vary greatly from individual to individual and whose causes are very complex. Whether or not this later conception really represents a distinct anthropological type or not must depend on the definition of a type. As to this definition there is still more or less difference of opinion and probably always will be. But that the criminal by nature suffers from a considerable

¹ *Op. cit.* p. 78.

number of organic anomalies is now almost universally believed and there is also pretty general agreement as to what these anomalies are. And this is the fact of practical importance, for a knowledge of the existence, the character and the causes of these anomalies enables us to treat them intelligently.

We can now summarize briefly the evolution of criminal anthropology and sociology. When Lombroso and his co-workers commenced their study of the criminal, the phenomena which lent themselves most easily to observation were the anatomical stigmata which could be measured in the cadavers of criminals. Furthermore, these stigmata being subject to exact measurement were least disputable and therefore furnished a basis for classification and led to a theory of criminality. This was the theory of the criminal as an atavistic type. This theory aroused interest and stimulated research, which showed the inadequacy of the study of the anatomical stigmata alone and caused the study of other parts of the criminal, his nervous system, viscera, mental traits, etc., which revealed many anomalies as the biological stigmata of criminals. These biological stigmata led to the analogy and even to the assimilation of the criminal with the epileptic and the degenerate and in part with the insane. For the explanation of these two orders of stigmata it was necessary to extend the research to the study of the sociological stigmata of crime which confirmed the belief that crime and criminals are inevitable products of social life. Thus the anatomical stigmata implied a biological

formula, while the anatomico-biological stigmata required a sociological synthesis.¹ This synthesis is now being made and has already reached a stage of great practical utility, but it can never become complete on account of the great complexity of the factors involved.

The relation between criminal anthropology and criminal sociology is a matter of importance. As we have seen, Ferri makes criminal anthropology the basis and its inductions the starting point of criminal sociology. While there is pretty general agreement as to the anthropological characteristics of the criminal, there is more or less disagreement as to what weight these characteristics have in causing crime. Two general currents of opinion exist with regard to this question. The one gives great practical weight to these characteristics and regards the individual causes as preponderating in the genesis of crime. This opinion is represented by Lombroso, Ferri, Garofalo and many other distinguished criminologists. The other opinion, though not necessarily denying the individual characteristics and their significance, gives more weight to the social causes and regards them as predominant in the genesis of crime. This opinion is represented by a group of French criminologists who have their headquarters at the University of Lyons. The leader of the so-called school of Lyons is Professor Lacassagne, who, as an expert in medical jurisprudence and as the founder and editor of

¹ J. Dallemagne: *Les stigmates anatomiques de la criminalité*, Paris, 1896.

the *Archives d'anthropologie criminelle et des sciences pénales*, has done much to stimulate the development and growth of the science of criminal anthropology. But from the very first he has insisted upon the importance of the social factors and by so doing has assisted greatly in removing from the doctrines of criminal anthropology their original unilateral character. Lacassagne has summed up his position in a phrase which has been many times repeated. "The social environment is the *bouillon* of culture of criminality; the microbe is the criminal, an element which has importance only when it finds the *bouillon* which makes it ferment."¹ This statement is, of course, in a sense true of the other point of view also, for even according to Lombroso and his followers it is possible for a person with very pronounced criminal characteristics to live an honest life if born in exceptionally favorable circumstances. But their belief is that the tendency of such a person is to become a criminal and he will usually become so however favorable his circumstances. Lacassagne, on the contrary, believes that distinctly unfavorable circumstances are almost always needed to develop the inborn criminal tendency. He has also published studies upon the connection between criminal tendencies and the temperature, showing that crimes against property predominate in winter, while crimes against the person increase with the temperature and reach their maximum in summer.

¹ J. Dallemagne: *Les théories de la criminalité*, p. 157, Paris, 1896.

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Other members of this school have shown the influence upon crime of the professions, education, etc. The International Union of Penal Law, founded by Prins, Van Hamel and Von Litz also represents this opinion.

While there is a sort of competition between these two opinions there is in reality no contradiction between them. Both are searching for the natural causes of criminality and neither denies the validity and value of the data of the other, but each tends to regard as more important its own data. And this competition will probably in the end prove to be very beneficial for the development of these two sciences, for it is stimulating the accumulation of a great deal of very varied data. As the synthetic process which has been referred to continues and the synthesis becomes more nearly complete, these two opinions will become reconciled and the data accumulated by means of their competition will have furnished a broad and therefore stable foundation for the inductions of the science of criminology. This belief is fully justified by a consideration of the fundamental identity of the phenomena studied by criminal anthropology and sociology. While it is true that at any given moment individual factors share with social factors in causing crime, still these individual factors themselves are in large part the cumulative result of social environment in the past. The exceptions are the atavistic characteristics which date back to lower species or to a period anterior to human social life, while if these are a form of degeneracy

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they also may be attributed to the social environment. On the other hand, the social factors are made up of individual factors so that in the etiology of crime, as in that of any human phenomenon, no fundamental distinction exists between these two orders of factors.

A great complexity of data making a complete synthesis impossible is characteristic of criminal sociology just as it is characteristic of all the social sciences. No one of these sciences can be reduced to laws of mathematical exactness but this does not destroy their practical utility. The science of economics, for example, has not reached such exactness, but its inductions have been of great value for legislation. So that to apply criminal sociology to penal legislation is by no means impracticable. But it is applicable more especially to those indirect measures for the prevention of crime which Ferri has called the equivalents of or substitutes for punishment. While its inductions are of great importance also for the direct means of preventing and repressing crime, criminal anthropology plays here what is perhaps a larger part, because in the direct means of fighting against crime the individual criminal is dealt with in person. Whether his crime may have been caused principally by social or by individual factors, when it is necessary to decide what treatment is to be given him his individual characteristics must be given great weight, even by those who believe that the social factors have been the principal causes of his crime.

Applications have already been made of criminal

anthropology, of which Lombroso gives several examples, from which I will quote a few:

"Bersone Pierre, 37 years old, well-known thief, had been arrested under suspicion of a theft of 20,000 francs made on a train. In prison he simulated insanity, claiming that he was poisoned; it was soon discovered with certainty that he had committed many other thefts, having been found provided with a quantity of pocket-books and passports, among others the one belonging to a certain Torelli. At the anthropological examination were noted: average cranial capacity, 1589 cubic centimeters; the cephalic index, 77; a complete criminal physiognomic type. The touch was nearly normal, the tongue 1.9, 2-3 in the right hand, 2-1 in the left, with sensorial mancinism. The general sensibility and the sensibility to pain were very obtuse; 48 and 10 millimeters of the *charriot de Rhumkorff*, while they are about 61 and 24 millimeters in a normal man.

"The study with the hydrosphygmograph—an instrument by means of which is put in evidence the movements of the pulse and the modifications in volume of the members under the influence of an emotion and which expresses in millimeters the psychic emotional reaction—confirmed me in the observation of his great insensibility to pain, which was not changing his sphygmographic lines; the same apathy persisted when we talked to him of the theft on the train, while an enormous depression was observed—a lowering of 14 millimeters—when we talked to him of the Torelli theft. I concluded

from that that he had not taken any part in the theft on the train, while he had certainly participated in the Torelli theft; and my previsions were completely verified.

"Gall—Marie, 66 years old, of Lucera, was found dead in her bed, the face to the mattress, the nostrils tinged with blood, crushed and torn internally. Suspicion at once rested on her two sons-in-law, M— and F—, of very bad reputation and who had been seen prowling around in the vicinity during the day. They alone had interest in the death of the victim, who was upon the point of contracting a life-annuity which would disinherit them.

"At the autopsy were discovered all the internal characteristics of advanced putrefaction and of asphyxia, and in the aesophagus was found a *lombricoide ascaris*¹ resting upon the opening of the glottis. Two experts declared that it was a case of asphyxia caused by violent suffocation while holding the victim with the face against a cushion, the *ascaris* having been brought there only by an attack of coughing. Another expert admitted the asphyxia, but was unwilling to exclude the possibility that the intestinal worm had caused it. Called in my turn to give superior expert testimony I could not fail to observe that the death from asphyxia provoked by *lombricoides* are always of children or of insane persons and are opposed constantly by a great reaction which was completely lacking in this case; that, on the other hand, the witness C— declared to have heard

¹ An intestinal worm.

suffocated cries on the night of the crime and blows from the direction of the room of the victim; and above all, that the accused M— was anthropologically and judicially suspected of the crime of which he had been openly accused by his brother, who, much less criminal than he, was less obdurate in denial. The former was, in fact, most completely the type of the born criminal; enormous jaw, frontal sinuses and zygomas, thin upper lip, huge incisors, a large head with exaggerated capacity, 1620 cubic centimeters, an obtuse sense of touch, 4.0 on the right and 2.0 on the left and more developed on the right than on the left, that is to say, with sensorial mancism. He was condemned.”¹

Criminal anthropology has also aided in saving or at least in rehabilitating innocent persons who were accused or condemned.

“A little girl, three and a half years old, having been violated and infected by an unknown person, her mother accused successively six young men, living on the same staircase and who were acquainted with the little girl. They were arrested but all denied the crime. I picked out at once from among them one having obscene tattoo marks upon the arm, a sinister physiognomy, an altered visual field and upon whom we found the traces of a recent syphilis. Later this individual confessed his crime.”²

“A certain Rossotto Giacinto, as the result of a series of false indications and of a letter received

¹ *Le crime*, Paris, 1907, pp. 529-531.

² *Op. cit.* p. 532.

from his brother-in-law who begged him to give false testimony, was condemned in 1866 to life imprisonment for highway robbery. On examining this man before students I ascertained, to my great surprise, that he was the most normal type I had ever had in my hands. Height, 1.73 meters; 50 years of age, he weighed 74.5 kilograms; hair and beard abundant; average cranial capacity, 1575 cubic centimeters; cephalic index, 84; without facial anomaly. Very fine touch, 1.1 on the right, 1.0 on the left, 0.5 on the tongue; normal general sensibility (50), and to pain, 30 millimeters; he was ignorant of the professional slang and was not cynical. He manifested the spirit common to the majority of average men; he liked work, which had been during his long years of captivity his sole consolation; his conduct had always been exemplary; even in prison he had no other regret than that of his unjust condemnation and of the deprivation of his family. Married at 19 years, he had never known any other woman before, and his family included neither insane persons nor criminals. While I was examining him, knowing nothing as yet of his antecedents, I said to the students: 'If this man had not been condemned for life, he would represent for me the true type of the average honest man.' It was then that the unfortunate man with a quiet reaction replied: 'But I am honest, and I can prove it.' And he put at my disposition numerous documents proving his perfect respectability; such as declarations, on the death-bed, of the real authors of the crime with which he

was charged, which excluded before the justice of the peace all complicity on his part; and affidavits of the directors of the prison, etc. His neighbors, from whom I gained information, after my study declared him a perfectly honest man."¹

It may be contended that by means of these scientific methods absolute certainty cannot be attained and that therefore ideal justice cannot be administered. But, in the first place, very few believe to-day in the existence of absolute justice. Justice is a conception which has grown out of the relations between men and has changed as these relations have changed. In the second place, even in administering this relative ideal of justice the existing system falls very far short of certainty. Some of the leading modern jurists who have been most positive in their thought have recognized that accuracy can be obtained only to the degree that the methods used are scientific and the methods used in administering justice to-day are only to a small degree scientific. In the law of evidence, for example, are recorded the empirical results from the observation of witnesses, but they have not yet been subjected to the criticism of modern psychology.

It is, therefore, with confidence that by means of scientific methods the greatest accuracy can be obtained and justice can be administered according to the highest existing standard of justice and equity that we now commence our study of the applications of criminal anthropology and sociology to criminal procedure.

¹ *Op. cit.* p. 532.

CHAPTER III

SOCIETY AND THE CRIMINAL

It is the custom of legal writers to start out from an abstract definition of crime. But while crime is the thing that society is fighting, its definition is not the first thing we can determine in any criminological study, if indeed it is not the very last. This is because crime does not exist in the abstract but its existence depends on the one hand upon certain acts committed by individuals called criminals and on the other hand upon the effect these acts have upon other individuals. The conception of crime arises out of the relations between this smaller group called the criminal class and the larger group called society which are established by these acts called criminal. To arrive at an abstract definition of crime, therefore, it is first necessary to study these two groups from the point of view of this relationship.

The criminal anthropologists have sometimes been criticized for beginning their work without adopting a definition of crime. But it is evident from the above paragraph that their work is a necessary step towards arriving at this definition and to start out from the definition which should

be their goal would be to put the cart before the horse. A further criticism deduced from the first one has been that if the criminal anthropologists have not yet adopted a definition of crime how can they be sure that the persons in the prisons whom they are studying have been guilty of crime. But this criticism arises out of this conception of crime as something abstract. The fact that these persons are in prison is strong evidence that they have committed these acts which are called criminal because they have a certain effect upon society.

Nor is it necessary for the criminal sociologist to start out from a definition of crime, for his inductions must be added to those of the criminal anthropologist before the synthesis can be made from which will come the definition of crime. And as this synthesis can never be complete on account of the complexity of the phenomena involved so this definition can never be complete, and as this synthesis can never be final on account of the changes that are certain to take place so this definition can never be final.

It is, therefore, evident that it is impossible to establish a precise definition of crime here. Furthermore the attempt to do so would be out of place in this study since this is a contribution towards the synthesis from which this definition must come. But while this precise definition is impossible it will be worth while to indicate what kinds of definition must be eliminated and then in a general way in what terms this definition must be expressed. To do this it will be necessary to review briefly some

of the definitions of crime which have been formulated and this review will also prove the impracticability of formulating a definition here.

The commonest kind of definition of crime is the legal definition, of which the following are a number of examples:

"A crime is an act committed or omitted in violation of a public law, either forbidding or commanding it."

A crime is "an offense which is pursued by the sovereign, or by the subordinates of the sovereign."

"A crime is a wrong, directly or indirectly affecting the public, to the commission of which the state has annexed certain pains and penalties, and which it prosecutes and punishes in its own name."

These illustrations show that according to the legal definition a crime is an act designated by the law, the sovereign or the state as the case may be. But the reasons why these acts are picked out are not indicated, except in a very vague way in the third example according to which a crime is a wrong affecting the public. The legal definition, therefore, does not help us to a knowledge of the inherent nature of crime. Furthermore, the same acts have not been considered criminal at different periods of time and are not considered criminal in different codes at the same time. This indicates that it is not possible to draw up a list of acts which have always and universally been considered criminal. It is therefore evident that a definition of crime cannot be derived from a study of criminal acts alone.

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It is this consideration which, as we have already seen, led Garofalo to search elsewhere for a definition of crime. "If it is necessary then to give up the possibility of forming a catalogue of *acts* universally hated and punished in whatever time or place, is it likewise impossible to grasp the idea of the natural offense? We do not believe so; but, in order to attain it it is necessary to change the method, to abandon the analysis of acts and to undertake that of the *feelings*. Crime, in fact, is always a harmful act which, at the same time, wounds some of these feelings which it has been agreed to call the moral sense of a human aggregation."¹ But before beginning this analysis of the feelings he draws a distinction between the "natural offense" (*délit naturel*) which offends the moral sense and conscience and the "legal offense" (*délit légal*) which is artificially created by the law, as, for example, for political reasons or for certain peculiar conditions. A similar distinction existed in the Roman law between the crimes showing moral turpitude (*natura turpia sunt*) and those created for the common security (*civiliter et quasi more civitatis*). The same distinction exists in the English common law between "common crimes" (*mala in se*) and "statutory crimes" (*mala prohibita*).

On the psychological basis of the analysis of the feelings he commences his search for the definition of the "natural offense." He traces the evolution of the moral sense and the development of sympathy

¹ *La criminologie*, Paris, 1905, p. 5.

between similar persons. Out of this sympathy has grown the ego-altruistic feeling of pity which is a dislike to inflict on others suffering which we ourselves have endured. Later was developed the more altruistic feeling of justice which manifests a solicitude for the interests of others. This feeling when it manifests itself as a respect for what belongs to another he calls probity. He then comes to the conclusion that for an act to be criminal it must violate one or both of these two fundamental altruistic feelings of pity and of probity, as they are possessed on the average in the community.

In making the distinctive characteristic of crime subjective, the author of this definition has made it general as to time and place. But it is not complete, as he himself has recognized, because it does not include violations of other feelings, such as that of modesty.

A distinguished sociologist, Durkheim, has proposed the following definition of crime: "An act is criminal when it offends the vigorous and well-defined states of the collective consciousness."¹ This definition is, to begin with, too vague. It is subjective in taking into account the violation of feelings. But it does not consider the subjective conditions of the author of the acts and is therefore too objective. Under this definition could be included accidents where no criminal motive existed. It is entirely sociological and juridical in its character.

As I have said at the beginning of this chapter, crime depends for its existence "on the one hand

¹ *De la division du travail social*, Paris, 1902, p. 47.

upon certain acts committed by individuals called criminals and on the other hand upon the effect these acts have upon other individuals." It is, therefore, necessary in formulating a definition of crime to consider these acts both as committed by the criminal and as affecting society.

Ferri recognizes that it is not yet time to formulate a definition of crime and believes that there will be no ultimate synthesis. While therefore he attempts no definition of crime he indicates what that definition should include. He is careful, as always, to recognize both the biological and social aspect of crime. "The characteristic elements of the natural offense are the anti-sociality of the determining motives and the injury done to the conditions of existence (individual or social) which imply the elements of offense to the average morality of a determinate collective group."

The attempts to formulate a scientific definition of crime have been useful in stirring up discussion and in showing at what stage the synthesis of criminality has arrived. But the incompleteness of all these definitions shows that we cannot yet hope to formulate with any degree of success a definition of crime. We are therefore justified in continuing this study without attempting a precise definition. For the practical purposes of this book the lack of such a definition is no obstacle for we always have the concrete elements of crime before us in the acts of criminals and their effect upon society. The only person who can take exception to this lack are those who start out with an *a priori*,

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abstract conception of crime according to which these acts do or do not constitute crime. But we believe that crime exists only in these concrete elements and the definition about which we have been speaking will merely describe in abstract form what exists only in the concrete. We can, therefore, continue our study of these concrete elements of crime.

We must now study this relation which is established between society and the criminal by the commission of crime. This relation is but one example of the general relation between society and the individual. But the character of this relation is very much accentuated in this particular case because of the injury which has been done to the rights created by the relation. It would not be possible within the narrow limits of this chapter to discuss fully the character of the relation between society and the individual which is a subject to which much thought and many books have been devoted. But it will be necessary to call to mind a few of the principal facts with regard to this relation in order to furnish a theoretic basis for the treatment of the criminal by society.

In the first place it must be remembered that the criminal, like every other individual, is the product of society. There are very few individuals who pass their lives in solitude away from the influence of society. As we have seen, heredity is in fact the cumulative result of social environment in the past. The part of heredity which is not the product of society is made up of that part which dates

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back of the origin of society and the part which comes from the physical environment. It would be impossible to estimate what proportion this part bears to the whole. But as this proportion is approximately the same for all we can at least say that all are to the same degree the product of society. This equality would seem to be broken in the case of criminals with atavistic traits which date back of the origin of social life. But if these traits are caused by degeneracy their appearances may then be attributed to social life.

We may, therefore, ignore the extra-social elements in heredity and proceed on the assumption that the criminal is the product of society. If this be the case it would seem that society is responsible for crime and criminals. This idea has been expressed by Lacassagne in a statement which is one of his fundamental principles: "Societies have the criminals they deserve."¹ This statement would seem to imply that society is to blame for the criminals it contains. But this idea is rather absurd since society is not a person with a will and independent power of action. Furthermore this statement gives no indications of the hereditary and physical causes of crime which we are neglecting because of the impossibility of measuring them, but which nevertheless exist. This is not a moral question at all but a scientific one of cause and effect. The scientific fact which this statement very vaguely indicates is that at a given moment in a

¹ *Archives de l'anthropologie criminelle et des sciences penales*, Lyons, 1891.

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community the amount of criminality is in direct proportion to the criminal forces then existing in the community. Ferri has very aptly expressed this fact in his law of criminal saturation which I have already quoted. According to this law in a given social environment at a given moment a determinate number of crimes will be committed just as in a given volume of water at a given temperature will be dissolved a determinate quantity of a chemical substance. This is no more than an affirmation of the familiar law of the conservation of energy. But it is so easy to forget that this law applies to crime just as it does to all other phenomena that it is worth while to reaffirm it.

In the second place it must be remembered that society is made up of individuals and does not exist apart from these individuals. Anything done in the name of the social welfare is done for these individuals. The question may at once be raised from whence comes the sanction by means of which duties and restrictions can be imposed upon individuals in the name of this social welfare. Many theories have been formulated to answer this question. The most famous of these and the one which has had most influence in modern times is that of the social contract. According to this theory each member of society surrenders voluntarily an equal amount of liberty in order to receive back the advantages of union with others. The sanction for the punishment of criminals is very easily deduced from this theory. "Every malefactor, attacking the social law, becomes by his transgres-

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sions rebel and traitorous to the country; he ceases to be a member of it in breaking its laws, and he even makes war against it. Then the preservation of the state is incompatible with his preservation; it is necessary that one of the two should perish, and when the guilty one is killed it is less as a citizen than as an enemy.”¹ This theory describes the existing conditions in the civilized countries of the world and limits the restraints upon the individual within the bounds of social welfare. But its hypothesis, that men have consciously and voluntarily formed this contract in the past, is disproved by history so that we shall have to search elsewhere for the sanction for social restraint upon the individual and in particular for the punitive treatment of the criminal by society.

One of the most salient facts in the organic world is the struggle for existence in which every living being is engaged in one form or another. This struggle for existence is made possible for living beings by the ability of organic matter to respond to impressions from outside, a characteristic which is not possessed by inorganic matter. This ability in the lowest forms of life consists only in a faint irritability or sensibility which responds by means of automatic movements. But as organic matter becomes more complex and consciousness of the external world is acquired the kinds of response become very varied. So it comes to pass that in this struggle for existence, members of the higher species react against that which injures them.

¹ J. J. Rousseau: *Du contrat social*, Livre II, Ch. 5.

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This reaction varies in its manifestation according to the object which causes the injury. When this object is a living being of the same or of another species, this reaction takes the form of defense either to prevent the immediate injury or if that be too late to prevent further injury in the future. In the first case a personal combat usually results, in the second case the injured party seeks for an opportunity to wreak vengeance upon the one who has done the injury.

This form of individual reaction manifests itself in primitive man as in other species of living beings. But as social life develops among human beings this individual reaction is absorbed by a form of social reaction. It becomes evident that certain acts by its members are injurious to society as a whole and society therefore reacts against them. In the earliest form of social organization, the tribe, this power of social reaction was usually vested in the chief of the tribe. He was at first not only legislator but also judge and executor of the law. A reminiscence of this primitive stage of justice is still to be found in the principle which still exists in some countries that "justice emanates from the king." But as the social organization became more complex and its functions more numerous, it became necessary for the chief to delegate some of his powers. In addition to being the military and civil head of the tribe the chief was also its religious head. His religious functions he delegated to priests. Up to this point social reaction against crime had been

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purely defensive for the conservation of society. But now the priests secured control first of the repression of anti-religious acts and finally of all anti-social acts and by so doing gave to the repression a religious character. Consequently this defensive reaction, which was first private vengeance by the injured person or by his family and then public vengeance by the chief of the tribe, now became divine vengeance and was administered with religious formalism and in a spirit of penitence and purification. When the priests lost their civil and political power they lost control of the penal functions first for political offenses and then for common crimes. But the penal function carried with it from its religious stage its moral character so that crime was still regarded as a moral fault and justice as a retribution for sin. So that the penal functions, after having passed through a primitive stage when it was a vindictive, defensive reaction, individual or social, and then a religious stage which gradually passed into an ethical stage, reached the present stage when it is juridical in its form, being administered in accordance with a body of laws, but to it is given an ethical significance. Among modern criminologists there has been a tendency to base the right to punish on such social reasons as "social utility," "direct defense," "political necessity." Among these criminologists may be mentioned Beccaria, Bentham, Romagnosi, Comte, Carmignani, etc. These ideas have had a great deal of influence on penal legislation, much of it having been adjusted with a view

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to its social value. But there has been retained by these criminologists and in all penal systems the criterion of responsibility or of moral culpability so that the penal function is not yet purely defensive in its character.

✓ These are the principal stages through which the penal function has passed since its origin. They show the difficulty of deducing an *a priori* basis for the right to punish. But by means of the positive and inductive method of tracing it from its origin we have arrived at a satisfactory basis. We have seen that from its earliest predecessor in the automatic reaction of the lowest forms of life, through the progressive development and variation of this reaction to the earliest form of the conscious reaction of one individual being against another who has done it injury, and through the development of this individual reaction into a social reaction exhibited occasionally among animals but in its present complex form only among men, in all this long and slow evolution we see one aspect of the struggle for existence. And in this fact we find ample justification for the penal function. Just as the lower animals react against members of their own species or of other species who injure them, so man, by means of his social organization reacts against those of its members who do it injury. So it is that the right to punish is based upon the necessity of social defense, a necessity imposed by the struggle for existence.

But this necessity for social defense must now be defined more fully in order to indicate just what it

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implies. And first must be recalled the two principles which were stated at the beginning of this discussion, namely, that each individual is a member and to a large extent a product of society, and, on the other hand, what is the reverse aspect of the same fact that society is made up of individuals and that social welfare is no more than the welfare of these individuals. These principles must be kept in mind and constantly applied in every discussion of this delicate balance between the rights of society and of the individual. It is, therefore, evident that in this discussion we must recognize both the criminal and society. To the criminal as to every individual belongs every right and liberty which does not encroach upon the rights and liberties of others, and the fact that the peculiar character of criminals and their acts, which do encroach on the rights of others, necessitates a greater limitation than usual upon them must not blind our eyes to their fundamental rights as individuals. On the other hand society, in defense of the social welfare, has the right to restrain persons, such as criminals, who are encroaching upon the rights and liberties of others. By doing so it will administer justice, which is, as Spencer has said, "the liberty of each limited only by the equal liberty of others."¹

These principles, couched as they are in juridical and philosophic terms, may seem too *a priori* and deductive in character. But they are in reality inductions based upon a study of the origin and evolution of the penal functions and merely restate the

¹ H. Spencer: *Justice*, London, 1891.

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principle of social defense. By defining in greater detail the principle of social defense the inductive character of these principles will be shown more clearly than ever.

We have seen that the early forms of reaction, individual and social, from which originated the penal function were inspired by a feeling of vengeance. Though the motive for vengeance was defense, individual or social, it frequently went beyond the necessities of defense in its blind passion. Thus it overreached itself and frequently did positive social injury, as when a whole family was destroyed on account of the offense of one of its members. Later when the penal function assumed a religious and moral character additional force was given to this feeling of vengeance and punishment was carried still further beyond the bounds of social defense. This feeling of vengeance still has its influence. Social vengeance is occasionally referred to in the courts while it manifests itself outside of the law every time a mob takes the law into its own hands. When a lynching takes place, for example, the mob is inspired by the necessity of defending itself against a dangerous kind of crime and criminal, but in its blind rage it is frequently carried much beyond the necessity of defense. And here may be noted the incapacity of the spirit of vengeance for administering justice. While it may be inspired by the legitimate motive of defending itself it is incapable of judging calmly and wisely what measures social defense demands and then going no further than those measures.

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Justice administered in a vindictive spirit tends to carry too far the authority of society over the individual and thus destroys the balance between social and individual rights.

Another circumstance which has tended to destroy this balance in favor of social authority has been an autocratic or strongly centralized government. As we have seen, in the earliest social organization, the tribe, the power of the penal function was usually vested in the chief. Later when society grew more complex it was vested in a strongly centralized government which has been the usual form of government throughout history. It was to be expected that in such a form of government the individual should be ignored and that social power should be used to an excessive extent in repressing crime. The modern rise of democracy was necessary to reassert the rights of the individual.

It was the arbitrariness and cruelty of the repression resulting from this excessive use of social authority against which the eighteenth century philosophers protested. They were then proclaiming the democratic doctrine of the equality of men against the usurpations of power by autocrats and tyrants. The classical school applied this doctrine of equality by setting up as a standard of punishment the character of the crime committed by the criminal. Its object in doing so was the very generous one of putting all men on an equality before the law. But it failed to see that in doing so it was crippling to a considerable extent the function

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of social defense in preventing it from adjusting its measures to the character of each criminal. Thus it made impossible the individualization of punishment, the importance of which for an efficient social defense will be shown in the next chapter. It will therefore be sufficient to say here that in failing to discriminate between criminals the classical school was guilty of an exaggeration of individualism.

The classical school adopted as a basis for punishment the moral responsibility of the criminal. Theoretically this had been the basis of punishment for a long time previous, but the judges, having acquired an arbitrary power, tended to ignore this principle and adjust the punishment to the dangerousness of the criminal. In other words, they were individualizing punishment regardless of moral guilt but in a very crude and empirical manner since they did not then have any accurate standard of judgment. The classical school in adopting moral responsibility as a basis for punishment was endeavoring to introduce equality into the treatment of criminals, but as in the previous case it was again guilty of an exaggeration of individualism. It will now be necessary to consider carefully this question of penal responsibility in order to determine on what grounds the criminal can be held responsible for his acts.

This idea of moral responsibility was introduced into the treatment of criminals by religion from its doctrine of free will. According to this doctrine man is free to act as he chooses. He is,

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therefore, able to act well or ill according to his own choice. If then he chooses to act ill he is responsible for his act and should be punished for it. It is not possible to enter into an exhaustive discussion of the arguments for and against a belief in the freedom of the will and in any case this is hardly the place for such a discussion. But inasmuch as the doctrine of free will is still very generally accepted as a basis for penal responsibility it will be necessary to call attention to several facts in connection with this doctrine.

In the first place this doctrine has always been seriously questioned. Many philosophers might be cited in this connection, as for example, Spinoza, who said that "the consciousness of our liberty is only the ignorance of the causes which make us act." Even in religious circles it has been denied as by Calvin who believed in the predestination of human acts. But the strongest evidence against the doctrine of free will has been furnished by the modern science of physiological psychology. This new science has been studying the evolution and nature of the psychological processes of thinking and willing and the human personality. It has started from the origin of all psychic phenomena in the sensitiveness to outer forces of the elementary form of organic matter which responds with a simple reaction and has traced the development of these phenomena to their most complex form in the self-consciousness of man. No one has ever thought of attributing moral liberty to the lowest forms of animal life such as the protists. The

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evolution of the highest forms of psychic phenomena from the lowest has been by means of a continuous series of actions and reactions between organic and inorganic matter. At no point in this evolution is there any evidence that the power of moral liberty has been introduced. The introduction of such a power would be an exception to the law of the conservation of energy which is the fundamental principle of science and would therefore destroy the foundation of modern science.

Furthermore a study of human psychic processes furnishes no evidence of the existence of a free will. These processes may be sketched in a few words as follows: A sensation from the outer world or from within the body goes by means of an in-going or efferent nerve to a nerve center. There it stimulates a vibration along an out-going or afferent nerve which results in a muscular movement or mechanical action of some sort in some part of the body. The majority of these muscular and mechanical reactions are unconscious and reflexive so that we need not stop to consider the forces that determine their character. But some of these are conscious and here, if anywhere, resides the power of a moral freedom of choice. In these cases the individual is aware of an act before he commits it and also is aware sometimes of the possibility of committing one of several different acts, one of which he finally commits. Or he may be aware of the possibility of committing one or more acts but finally desists from committing any of them. These are the circumstances under which the in-

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dividual gains the impression that he is exercising a freedom of choice. But a study of the mechanism of judgment does not reveal any such freedom.¹ When a sensation comes to the highest and most complex nerve center, the brain, it stimulates an impulsion just as in the lower nerve centers. But here are accumulated the records of all past sensations which have come to the brain and which are of a great variety. Some of these past sensations are awakened by this new sensation and its impulsion by means of the paths of association. Some of these awakened sensations may oppose the impulsion, others may strengthen it, while still others may attract it in other directions. This conflict of forces will cause a delay and the judgment will be the resultant of these forces. Thus we see that the judgment is a mechanical process admitting no freedom of choice.

Out of this mass of accumulated sensations, called the memory, self-consciousness is evolved. By means of the memory the present state of consciousness is connected with past states of consciousness. From the sense of continuity thus obtained is developed the consciousness of a self independent of other selves. The memory is also the basis of personality, which is indeed only the sum total of all past sensations. To this personality expression is given every time a new sensation awakens past sensations. If the brain is strong and vital with a high degree of nervous tonic it will exercise a powerful control over the

¹ Maurice de Fleury: *L'âme du criminel*, Paris, 1898.

new sensation. If it is weak and inert the new sensation will triumph easily over past sensations. In this process one of the principal elements of the personality, namely the volition, is manifested. In the first case cited above a strong volition is manifested, in the second a weak one. We see that volition is determined by the conditions of the nervous system and not by a moral freedom of choice. There are many evidences of this as, for example, the influence upon the volition of stimulants such as tea, coffee and alcohol and of narcotics. The diseases of the volition¹ also give evidence of this control of the volition by the nervous system. Alcoholism, excessive debauchery, etc., in the individual or in his heredity may result in such constitutional diseases as neurasthenia, degeneracy, etc., which weaken and even completely destroy the power of volition. In other cases abnormal or pathological organic conditions will increase the impulsiveness of the volition or will turn it into unhealthy or even dangerous channels.

These are the inductions of the modern science of physiological psychology which seriously question if indeed they do not completely disprove the doctrine of free will. In view of this fact is it wise to base criminal legislation on a foundation so uncertain and unstable and which is being attacked and shaken from all sides? Should not search be made for some other foundation for penal responsibility? The necessity for such a search has been recognized even by some who retain a belief in free

¹ T. Ribot: *Les maladies de la volonte*, Paris.

will but do not regard it as a practical basis for criminal treatment. The impracticability of a criterion of moral responsibility, regardless of whether or not moral liberty exists, on account of the difficulty of applying it in each particular case is sufficient reason for abandoning this criterion. This difficulty arises out of the mysterious character of this moral liberty which eludes all attempts at measurement, and its application in the treatment of criminals has resulted in many false deductions and absurd situations. Furthermore the negation, or to say the least, the ignoring of the existence of a free will has great practical value because it encourages those preventive measures whose object it is to influence and govern human volition by social motives.

Many attempts have been made to harmonize the doctrine of free will with the data of modern science by means of a theory of limited liberty. It would be possible to show the illogicalness of such a theory from a philosophic point of view. But more important for the considerations of our present study is the dangerousness of this theory when formulated in a criterion of limited moral responsibility. Such a criterion exists in most of the systems of penal legislation of the world and its result we see every day in the acquittal of the more dangerous kinds of criminals or in the diminution of their punishment because an absence or a weakening of moral responsibility has been proved in their cases, while the criminals in whom moral responsibility remains intact are most severely

punished notwithstanding the fact that they are frequently less dangerous criminals. Some of these theories of limited moral responsibility will be discussed when formulating a positive criterion of penal responsibility.

The preceding considerations, showing the theoretic uncertainty and practical uselessness of moral liberty as a basis for criminal treatment, prove the necessity for a criterion of penal responsibility independent of moral guilt. This is, in reality, nothing new. As we have already seen, primitive penal legislation was independent of any moral idea. Even the Roman law in its earlier phases treated a crime merely as an illegal act without any suggestion of moral fault on the part of its author.¹ And to-day certain crimes in which no moral responsibility is involved such as involuntary homicide and wounding are punished. Sometimes when the absence of moral responsibility has been proved, as in the case of criminal aliens, punishment is still inflicted. So that to treat all circumstances independent of moral responsibility is by no means without precedent and would only be an extension of the present tendency in that direction. This reform would bring about the same change in the treatment of and attitude towards criminals that has taken place with regard to the insane. It is not much more than a century since the insane, with the exception of violent maniacs, were regarded as morally responsible for their infirmity and as such

¹ Ihering: *Das Schuldmoment im römischen Recht*, Giessen, 1876.

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were treated with hatred, scorn and abuse. No one to-day holds the insane person as responsible for his character but the insane are no less subjected to restraint and special treatment, for the protection of society. The criminal will come to be treated in the same manner though with no slackening in the social measures taken against him. Even to-day we sometimes hear in conversation or in the journals, especially with regard to unusual crimes, the suggestion that the criminal is a phenomenon of individual and social pathology.

Having rejected moral guilt as a cause for punishment what other sanction is there for penal treatment? This question we have already answered in tracing the natural evolution of the function of social defense. We have seen that the original prototype of this function was the sensitiveness or irritability of the lowest forms or organic matter responding with simple reactions to external influences. This capacity to react developed in complexity until in the higher species of animals it became conscious reaction by one animal against another animal of its own or of another species. In the human species starting from this form of individual reaction the present highly organized mechanism for regulating these reactions between individuals was developed. So it is that when an individual is punished for an injury he has done to others he is experiencing a reaction of a social order. In like manner when he becomes sick he is experiencing a reaction of a biological order for injuries he has done or which have been done to

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his physiological system. Thus the sanction for punishment is the same as the sanction for the reaction which comes from the violation of any natural law or order of phenomena.

We can, therefore, say that a criminal is responsible for his crimes because he lives in society and adopt this as the basis for our theory of penal responsibility. In adopting this social basis for our theory of responsibility we are in harmony with the modern science of ethics. Up to this point we have been using the term "moral" in the metaphysical ideal sense which it has had in the past and in which sense it is still recognized in the existing theory of penal responsibility. But the exponents of the modern science of ethics have abandoned this metaphysical conception of morality and now regard it merely as a phenomenon arising out of social relations. Rights and duties for them result from these relations and do not exist in the abstract outside of them. According to these ideas the criminal is immoral because he has violated rights and failed to perform his duties. From this point of view our theory of penal responsibility is a moral as well as a social one. But inasmuch as the term "moral" is still used in its former metaphysical sense it is better not to use it in the present connection, in order to avoid misunderstanding.

Having adopted this social basis for our theory of penal responsibility the first step towards fixing this responsibility is to prove the imputability to an individual of a crime. As defined by Romagnosi,

one of the older Italian jurists of the classical school, imputability is the possibility of "attributing a determined effect to some one as to the cause by which this effect is produced." The simplest and most apparent form of imputability is the physical imputability of a person who has committed a physical and muscular act. But this is not sufficient to fix penal responsibility. This act must have been the last phase of a physio-psychic process, all of which has been physically free, without any regard to its moral freedom. When, therefore, a person commits an act under constraint from another, whether with or without a knowledge of the character of that act, he becomes only an instrument and the act cannot be imputed to him in the penal sense of that word. The servant who commits an act under the orders of his master cannot have that act imputed to him either when he is ignorant of the character of the act or even when he knows its character but is not in a position to disobey his master. Physical imputability alone is not sufficient to fix penal responsibility for an act but it must be physically free and connected with a physio-psychic process which has led the individual up to the act. Furthermore, though physical imputability forms a part of the basis for fixing responsibility in most cases, it is not a necessary part of that basis as in the case where the real author of a crime has used another as an instrument for its physical accomplishment. To determine, therefore, imputability, it is necessary to prove this relation of cause and effect, as

indicated in Romagnosi's definition, between the individual and the act committed. This imputability may be termed material imputability as distinguished on the one hand from physical imputability and on the other hand from moral imputability. And when the act committed is a crime this material imputability implies a social and legal imputability which according to our definition is equivalent to penal responsibility.

Having determined the method of fixing penal responsibility it may seem that there is nothing more to be said about responsibility. This would be true if our theory was based on the moral responsibility of the individual. In its original form this theory made responsibility equal for all. But absurd as it may seem to attempt to measure so metaphysical a thing as moral responsibility this is exactly what came to be done, so that we find it being estimated at a fourth, a third, a half, etc.¹ In one sense the responsibility is the same for all, according to our theory also, since all are members of society. But the social basis of our theory is more complex, introducing several elements in accordance with which the sanction for punishment may vary. These are the individual, the crime, and the society in which he lives. Of these three the one which is the most important factor in measuring responsibility is the criminal. The most important function of the crime is as an indication of psychophysical personality. Thus the responsibility of

¹ Cf. Mario Pagano: *Principii del codice penale*.

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the criminal according to our theory is of great value as evidence.

The society in which a criminal lives expresses its character in the penal code which changes as social conditions change and this element of the sanction for punishment is derived from it. According to the law of evidence, which will be discussed in a later chapter, it is determined whether a criminal act has been committed and its imputability to a certain individual. It remains to indicate what part the criminal plays in determining the extent and kind of sanction for punishment. In the preceding chapter we have reviewed the biological stigmata of the criminal. In later chapters will be indicated how these stigmata can be determined and put at the service of justice in the course of procedure. What elements in the character and personality revealed by these stigmata are of importance for determining this sanction, which is, in other words, penal responsibility in its practical applications? In one sense the whole character and personality are of importance. But certain characteristics are of peculiar significance and may be used as a criterion for measuring the responsibility of the criminal.

When moral liberty began to be discredited as a basis for penal responsibility, attempts were made to base responsibility on various other elements in the personality. We have already chosen the basis for our theory of penal responsibility and it would be easy to show the insufficiency of any one of these other bases. But nearly every one of them

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contributes something towards a complete criterion of responsibility. When it was recognized that free will no longer gave a stable basis for responsibility it was thought that it could be based on the other great section of the mind, the intellect. When put into practise this theory breaks down. It soon becomes evident that in many cases on account of insanity or some other pathological characteristic the intellect may be limited and yet the necessity for social defense, and therefore of penal responsibility, may be very great. In fact, according to this theory, as a rule the responsibility diminishes just to the extent that the need for it as a basis for social defense increases. The realization of this fact has led to the introduction in most penal legislations of treatment, under some other name than penal treatment, for the insane and other abnormal persons. But the classification is not yet complete and not until this theory is abandoned can the intellect gain its true significance in the treatment of criminals. As one of the elements in the criterion of responsibility, the intellect is of great importance. In general it may be said that a certain degree of intelligence is necessary to fit an individual for social life. He should be sufficiently intelligent to understand his relations towards others and the ordinary consequences of his acts. But this is not the only condition for adaptability for social life. Sometimes when the intelligence is sufficient the volition is too weak or too impulsive and leads the individual into crime. In such cases the theory of responsibility based on the intellect may work

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out successfully in practise because the intellect furnishes the basis for responsibility which will permit of the necessary penal treatment. But it does not succeed so well in all cases. Youth is usually recognized as a cause for irresponsibility. When the absence of intelligence in a child is the result of the normal physiological condition of an undeveloped intellect there may be good reason for irresponsibility. But if this lack of intelligence is a pathological condition the necessity for social defense may be very great. So in the case of drunkenness, which is frequently a cause for irresponsibility, if it is a temporary condition with no pathological basis its irresponsibility may be justified. But if it is an indication of a grave pathological state, as is frequently the case, social defense may require very strict measures. These examples show that the mere fact of the presence or absence of intelligence is not in itself a criterion of responsibility but that its significance depends in each case upon its cause and its relations to other characteristics.

Another element in the personality which has been chosen as a basis for responsibility is the volition. This basis has been adopted in a number of penal codes. But this also is not a sufficient criterion of responsibility. The mere fact that an individual wished to commit a certain act does not indicate what his intention was in committing it. Other faculties than that of volition must be taken into consideration. An individual with a very healthy volition may commit crime through

ignorance or under very exceptional circumstances. Here again in using volition to measure responsibility it must be taken in its relation with other faculties.

Our theory of responsibility, therefore, bases responsibility first, upon the conditions of society as reflected in the penal code, second, upon the commission of a crime and its material imputation to an individual, and third, upon the character of this individual as completely as it can be determined. And this theory shows how careful the positive theory of social defense is to recognize both social and individual rights. According to this theory society has the sanction to defend itself against any acts or persons who endanger its welfare while by abolishing vengeance and moral retribution as motives for criminal treatment and by carefully studying the criminal himself, his rights as an individual are abridged only to the extent that social welfare demands.

Criminal procedure may be termed the practise of social defense. It is, however, but one of the measures of social defense and is continuous with the others. The first and in the long run the most effective measures against crime are those preventive measures which aim to suppress the causes of crime. Whether, however, these indirect methods of fighting crime are, strictly speaking, measures of social defense, may be questioned. Both these methods and the direct methods of fighting crime have the same object and study the same phenomena. But the first deal with social

masses and conditions while the second deal with individuals, and individual acts, so that the methods used must differ. The relation between the two is similar to the relation between hygienic prophylaxy and therapeutics. So that while for purposes of convenience we do not class preventive measures under the heading of social defense we must not forget the continuity of these measures with those of social defense.

A second series of measures which also do not, strictly speaking, come under the heading of social defense but are continuous with the measures of social defense because they have the same fundamental object, is the series of reparatory measures administered by the civil law. In the primitive phases of the evolution of law, civil law and penal law were one, and during one period all penalties were reparatory. In course of time a distinction arose between the two based on a distinction between the motives and characters involved and also on the exigencies of society. Some legal writers still recognize the connection between them, as for example, one writer who after distinguishing public wrongs or crimes from private wrongs or torts, says, "there is a sense in which all wrongs are public wrongs since they involve an interruption of the duties of the subject to the state, or interfere with that protection which the state owes to the subject."¹ But the tendency among jurists has been to separate absolutely the two. The principal reason for this separation has probably been

¹ W. C. Robinson: *Elementary Law*, Boston, 1882, p. 239.

the idea that moral guilt is present in a crime but not in a tort. This, however, is no reason for such a separation since according to our theory moral guilt, in the metaphysical sense, is not a necessary element of crime. That there is a close connection between civil and penal law is shown by the fact that when civil law is prompt and just in its operation there is less need of recurring to penal justice. This is indicated by the fact that civil law was very highly developed among the Romans, while penal law was relatively less developed. Statistics show that when civil justice is slow and costly, crimes of violence increase.¹

So that civil justice tends to suppress some of the causes of crime and is therefore much like the preventive measures against crime, but differs from them like penal justice in not coming into operation until an injury has been caused. The agitation now going on in favor of replacing short imprisonments for misdemeanors with damages is tending to bring civil and penal justice nearer together and make more apparent the continuity between the two. This tendency might be emphasized. Unpremeditated offenses and certain premeditated offenses of a special sort, such as adultery and dueling, might be treated with reparatory and not penal measures.²

Lastly come the measures of social defense which may be divided into repressive and eliminative

¹ De Candolle: *Sur la statistique des délits*, in the *Bibliothèque universelle de Genève*, 1830. Zincone: *Del aumento dei reati*, Caserte, 1872.

² Ferri: *Op. cit.* p. 465.

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measures. The repressive measures are of a temporary sort to prevent recidivation in criminals who are not very dangerous. The eliminative measures are those which remove permanently from society those who have proved themselves to be a continual danger to society. The measures now in use are death, detention for life in a prison, agricultural colony or asylum for insane criminals, and transportation for life. Repressive and eliminative measures are put into effect by means of criminal procedure and the penal administration. Up to the present time procedure has had the function of selecting those who are to undergo these measures and the nature and extent of the punishment. But the tendency now is, as will be shown later on, to let the penal administration co-operate with the procedure in determining the extent and even sometimes the nature of the punishment. The penal administration has the function of inflicting the punishment but procedure may in the future have some influence in determining the character of the administration. By means of this interaction and co-operation between these two parts of the system of social defense the continuity which exists between them will be established in practise.

Elimination and repression are the social forms of natural selection and adaptation. Just as in the biological organism that which is entirely or almost entirely injurious is selected out and rejected, so from the social organism are eliminated the members that are most dangerous and least adapted to social life. Just as in the biological organism

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an object has to be adapted to its surroundings, so in the social organism many individuals must be adapted to their social surroundings. This process of selection and adaptation has been carried on throughout history but heretofore in a more or less crude and empirical manner. The reaction against criminals has been more or less unconscious and as we have seen, other elements such as religion have entered into this process. The result has been a great deal of waste. Much blood has been spilt and many lives lost without any social gain. But men are now coming to see the true function of this social reaction and to determine what are the methods with which to put it into effect with the least possible waste. As we have seen, the forces that cause crime are natural forces. We have rejected free will, which cannot be measured and determined, as a cause of crime. To prevent and repress crime other natural forces must be employed.

In criminal procedure the criminal is dealt with directly. It is, therefore, necessary to employ upon him the forces which will check his criminal tendencies. But to determine what these forces are it is necessary first to know the character of the criminal. In the previous chapter we have reviewed the inductions of criminal anthropology showing to what extent the peculiar characteristics of the criminal have been determined. It is therefore a question of applying these inductions in practise to every individual criminal. That this is perfectly possible we have every reason to believe.

As Ferri says, "when a criminal is examined directly with sufficient knowledge of anthropology and of criminal psychology, it is always possible to class him. It is easy sometimes for the most pronounced types, and easy sometimes even according to only a few symptomatic details of their attitude before, during and after the crime without a direct and personal examination being necessary; sometimes it is difficult as when these intermediary types are involved of which it is necessary to make a complete diagnostical examination, in their organic, psychic and social characteristics."¹

At the Congress of Criminal Anthropology held at Paris in 1889, Garofalo read a report on the following question: "When a person has been proved guilty can the class of criminals to which he belongs be established by criminal anthropology?"² He said that the anthropological characteristics can serve as indices of the psychic anomaly. Sometimes the kind of the crime alone can determine the class of the criminal especially in crimes of great cruelty which reveal an absence of the sentiment of pity. It then becomes necessary to distinguish between the born murderer, the morally insane criminal, the insane criminal and the epileptic. In other cases a psychological and anthropological examination is necessary. The judge must take into consideration the kind and frequency of crimes in the record of the criminal, his psychological

¹ E. Ferri: *Op. cit.* p. 173.

² *Archives de l'anthropologie criminelle et des sciences pénales*, 1889.

and anthropological characteristics and vicious, insane or criminal heredity. This examination will reveal the impulsive characteristics, that is, lack of resistance to impulses of anger or to nervous excitation resulting from alcoholism or from an alcoholic, convulsionary, insane or epileptic heredity. The anthropological characteristics are of greatest significance in the young criminals. Garofalo continued by saying that he considered psychology more important than anthropology in classifying criminals against property since the feeling of probity is less instinctive than that of pity, is less dependent on the organism and on heredity and is influenced more by external causes. Special classes of criminals to be noted are kleptomaniacs, physical and moral neurasthenics (those disliking work and moral conflict) resulting from a nervous constitution and a taste for pleasure, and criminals of habit of whom the young may be reformed.

This summary of Garofalo's report indicates the practical utility of the classification of criminals. Having determined the class of a criminal it will be possible to prescribe treatment according to his peculiar needs, as will be discussed in the next chapter. This will be very different from the old system according to which the crime was and is still to a large extent the only standard of punishment. According to this system the crime was punished in the criminal while according to our system the criminal will be judged and punished in his crime. The function of criminal procedure

should, therefore, be to serve as a mechanism for "the *appropriation of defensive measures to anthropological categories of criminals*,"¹ or to put it still more precisely, to adjust penal treatment to the individual criminal.

Criminal sociology also will help in adjusting the punishment to the individual. In the cases where there is little or no anthropological abnormality it will reveal the social causes of crime and will indicate the remedy. By gathering statistics of recidivation it will show the success of the various kinds of penalties thus acting as a criticism and check on procedure.

When, therefore, criminal procedure is based on criminal anthropology and sociology, crime will no longer be treated merely as a juridical phenomenon but primarily as an anthropological and social phenomenon. Its juridical character will then be determined by its anthropological and social character. Procedure will no longer be purely empirical or governed by criteria which are more or less independent of the character of the criminal but will be governed by strictly scientific criteria. This does not mean that absolute exactitude can be attained in every case. The limitations of the applications of science to procedure exist in the complexity of the phenomena involved. Since the different types of criminals shade into each other it is not possible to tell exactly to which type an individual criminal belongs. Many criminal characteristics are identical with those of other diseases

¹ E. Ferri: *Op. cit.* p. 574.

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making the diagnosis of cases very difficult. But even with these limitations, through science we shall reach much more satisfactory results than are reached by existing methods.

It is noticeable that this positive method greatly increases the importance of procedure. Not only will it have as heretofore to determine the commission and the nature of a crime but also the character of the criminal. And as procedure increases in importance the penal code will lessen in importance. The code will always designate what acts are criminal but under a positive scientific régime it will determine only to a limited extent the penalties since these will be determined usually by the nature of the criminal. This is in accordance with the fundamental character of these two parts of the penal system. It may be said that procedure was made for honest persons while the code was made for criminals. In other words the procedure in addition to being an effective means of dealing with criminals must also deal with such honest people as become involved in it. It must safeguard the interests of these honest persons and make it practically impossible for one of them to be convicted. The penal code on the other hand deals exclusively with those who have been found guilty and are presumably criminals. Its task is much simpler than that of procedure and only one special class is directly interested in it. But procedure is of interest and of importance to every member of society, for anyone is likely to become involved in its machinery. A positive procedure must retain

every guarantee of individual liberty above all for the honest person but also for the criminal so that the restrictions placed upon him shall not exceed those demanded by social defense. But it must also be an effective instrument of social defense. It should therefore not be hampered and almost crippled in the name of individual liberty by a system of determinate sentences designated by the penal code which makes impossible the individualization of punishment. If the procedure effectively guarantees the liberty of the honest person, the indetermination of punishment is no menace to it. But even to the liberty of the criminal this indetermination is no danger. By means of it the more deserving of the criminals will suffer much less punishment than under a system of determinate penalties while it will fall on the dangerous criminals alone with a weight which social defense will justify.

The problem before us, therefore, is that of outlining a system of procedure which will maintain to the highest possible degree this delicate balance between society and the criminal, on the one hand by safeguarding individual liberty with every possible guarantee and on the other hand by furnishing with the aid of science an effective social defense against crime.

Before closing this chapter it is necessary to discuss one other matter which is connected with this relation between society and the criminal. When the classical school rebelled in the eighteenth century against the then existing system in which

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punishment was frequently inflicted in a spirit of vengeance or with the idea that divine justice was being administered, it designated as one of the objects of punishment its deterrent influence on crime. As Beccaria expressed it, "the object of punishment is only to prevent the criminal from continuing to injure society and to turn his fellow citizens from attempting similar crimes."¹ This theory has become more and more prominent in recent years while the idea that punishment is a retribution for moral guilt has grown feebler. The theory is sometimes illustrated by the story of the English judge who, when a horse thief whom he had sentenced to be hanged remonstrated, replied, "I hang you not for stealing a horse, but that horses may not be stolen." This illustration indicates that individuals are sometimes punished more severely than their individual cases demand in the interest of society. This has not seemed moral to many and has shocked their sense of justice. From our point of view of the defense of society, this would be justifiable if social welfare really demanded it. But this would have to be clearly proved, otherwise this severe treatment would be a grave encroachment on individual rights. It is, therefore, necessary to consider carefully the deterrent influence of punishment on crime.

There is no doubt that, as Garofalo says, "penal repression furnishes motives to conduct in exciting and in sustaining the sentiment of *duty*."² Because

¹ C. Beccaria: *Traité des délits et peines*, Ch. XII.

² R. Garofalo: *La criminologie*, p. 263.

an act is stigmatized by the law as criminal and because the results from committing it are injurious, its immoral character is emphasized and it becomes repulsive and objectionable to us. This does not mean that its immoral character was not recognized before it became a crime. On the contrary few acts are made crimes until they have first been recognized as immoral by the public conscience. But their criminal character tends to react on their character as immoral by emphasizing it. "Assuredly the legislator has not the power to give the character of infamy to an action that public opinion considers as indifferent or honorable. He cannot act in a sense entirely opposed to public morality, but he can very well aid its development, revive it, prevent it from becoming feebler or becoming extinct."¹ Thus by raising the general standard of morality penal repression has in an indirect manner a deterrent influence upon crime.

But the kind of deterrent influence usually meant is where an individual is directly restrained from a crime by fear of a specific punishment. This has been formulated in the theory of psychological coöction whose principal exponents have been the German legal writer Feuerbach and the Italian jurist Romagnosi. This theory is stated in the following rule: "In order that the ill with which one is menaced on account of a crime should become a determining motive of conduct, it must be a little superior to the pleasure that one hopes to procure by means of the criminal act." According

¹ R. Garofalo: *Op. cit.* pp. 265-266.

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to this rule a penalty should be fixed for each crime whose undesirable consequences would a little more than outweigh the pleasure to be gained from the commission of the crime. This idea has had a great deal of weight in the formulating of penal codes. But the question may be raised by what criterion it is possible to fix this point. How can it be determined whether five years or ten years is enough to deter people from a certain crime. As no scientific criterion exists, the fixation of these penalties must be purely empirical. In practise both extremes have been attained. Sometimes penalties have been too severe. This has usually resulted in impunity because accusations were not made or judges and juries shrank from inflicting the penalty. Sometimes penalties have been too light thus acting as a very slight check on crime.

But the rule itself may be attacked for several reasons. In the first place it displays an ignorance of the character of the born criminal. We have seen in the previous chapter that a marked characteristic of this criminal is his lack of foresight. Consequently he will not usually measure the pleasure the commission of a crime will give to him with the ill he would suffer from its punishment in order to determine if it is worth while to commit the crime. Furthermore this theory ignores the powerful forces in the organism of a congenital criminal which lead him to crime regardless of whether or not he is conscious of the consequences. So that it is very evident that the deterrent influence of punishment on the born criminal is to say

the least very limited. In the second place the evil is a somewhat uncertain one since there is a possibility of escaping the penalty. This tends to lessen its deterrent influence for every one. In the third place an evil which is somewhat distant does not always serve to prevent a man from indulging in an immediate pleasure especially if the desire for it is violent and sudden. These reasons indicate that no such fixed relation exists between a crime and its punishment capable of being embodied in a penal code of determined penalties. On the contrary each particular case must be studied by itself in order to determine what amount of punishment will have the most deterrent influence. It is therefore as necessary to adjust the punishment to the individual criminal with a view to intimidation as it is for other reasons. The intimidability of the criminal is one of the characteristics which must be considered in individualizing punishment.

Like others of the characteristics which enter into individualization such as the intelligence and the volition, the intimidability has been made the basis for a theory of responsibility. According to this theory criminals are responsible because they are intimdable—the exceptions being the insane. It is argued that the born criminal and other abnormal persons who become criminals are no exceptions. On the contrary the intimidation is meant especially for them in order to furnish them with an additional motive to resist their criminal tendencies. “Without punishment, that is to say, without intimidation, the perverse individual would not find

any help against his perversity and could not do otherwise than obey it.”¹ To reply to this theory it is not necessary to deny that punishment has a certain amount of deterrent influence. On the contrary, it is quite in accordance with our positive theory to regard punishment as one of the means of fighting crime by furnishing a psychological motive to desist from it. But this is but one of the functions of punishment and therefore intimidability cannot be the whole criterion of punishment. Furthermore, as Ferri says, “if a man commits an offense, it is precisely because he has not been intimidated and because in the precise conditions in which he was when committing the offense he could not be intimidated by the penalty.”² The logical deduction from this would be that the only responsible persons are those who have not committed any crimes.

However, we may consider intimidability one of the characteristics which determine responsibility and therefore punishment. As we have already seen this characteristic is especially lacking in born criminals. It is therefore evident that if they are to be intimidated at all it is only by severe punishment. But this is not likely to happen under a system of fixed penalties because these are usually only moderately severe since they are destined to intimidate all kinds of criminals and also because they do not increase in severity for recidivists.

¹ Dubuissou: *Théorie de la responsabilité* in the *Archives d'anthropologie criminelle*, 1888.

² *Op. cit.* p. 426.

Such a code of fixed penalties is, as Von Liszt has said, "a veritable Magna-Charta of criminals" because according to it a criminal knows just what he risks when he commits a crime. Much more terrifying, and therefore intimidating, would be a system of individualization such as will be described in the next chapter, in which the criminal would be uncertain as to his fate but would know that persistent criminality is likely to lead to the extreme penalty. On the other hand, there are the criminals who are only slightly or not at all abnormal and who have committed crime largely through force of circumstances. These possess the largest amount of intimidability and therefore a system of fixed penalties may seem well suited to them. But contrary to the case of the born criminal such a system tends to be too severe for these criminals. A smaller amount of punishment will usually suffice for purposes of intimidation while the excess of punishment is likely to do much harm to the criminal and is a violation of individual rights. Objects other than intimidation must be considered such as the reform of the criminal and sometimes it must be wholly neglected in behalf of more important considerations.

Intimidation is then one of the ends of punishment, but its importance must always be estimated in its relation to the other ends of punishment. There are certain dangers which accompany it. Intimidation tends to an increase of the rigor of punishment both in length of imprisonment and in harshness of treatment, so that it helps to

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keep alive the feeling of vengeance as a motive for punishment. Furthermore it tends to distract attention from social reforms which are the most effective means of fighting crime. As compared to other ends of punishment it is not as important as adaptation and selection which protect society with the smallest amount of loss. So that it is evident that the principle of intimidation must be applied to punishment with great care in order that it shall not interfere but will co-operate with the other ends of punishment and in order that individual rights shall not be violated.

CHAPTER IV

THE INDIVIDUALIZATION OF PUNISHMENT

Several times in the preceding pages we have mentioned the importance of adjusting the treatment of the criminal to his character rather than to his crime. The tendency towards this method of adjustment has come to be known as the *individualization of punishment*.¹ On account of the great importance for procedure of this tendency and of the principle of individualization we will now discuss quite fully this principle and the ways in which it has already been applied.

A number of recent modifications in criminal procedure manifest this tendency. In America has originated the indeterminate sentence by means of which the duration of punishment of criminals guilty of the same crime may vary greatly according to their record in prison. The system of fixed penalties still obtains everywhere in Europe, but the expedient of extenuating circumstances has been introduced to temper the rigidity of this system. In America also originated suspension of sentence with probation or parole, which has been

¹ R. Saleilles: *L'individualisation de la peine*, Paris, 1898.
Wahlberg: *Das Princip der Individualisirung in der Strafrechtspflege*, Vienna, 1869.

copied in England under the name of *conditional release* and in France under the name of *condamnation conditionnelle* or *sursis* and which now exists in many other countries. But before discussing in detail these and other modifications it will be necessary to trace briefly the history of the individualization of punishment and then to analyze its principles.

As we have already seen, before the French Revolution the fixation of the penalties was left to the arbitrary power of the judges. As a writer of that time, Muyart de Vouglans, has expressed it: "It is a general maxim among us that penalties are arbitrary in this kingdom; not indeed that the judge has the liberty to condemn or to absolve at his will, but he must regulate his judgment according to the demands of each case, that is to say, to lessen or to increase the penalties according to the nature of the crime and of the penalties."¹ Here we see a kind of individualization but one which was based principally upon the material facts of the crime in each case and not on the subjective nature of the criminal. "The judge had full power to adapt the penalty to the gravity, not legal, but real, of the crime; and as for the fixation of the penalty, he was never bound by the law. He could regulate the penalty according to each fact, and in proportion with the gravity of each crime taken by itself."² However, since there were no laws regulating the fixation of the penalties, the judge could have

¹ *Institutes du droit criminel*, I, 4.

² R. Saleilles: *Op. cit.* p. 45.

determined them by the subjective standard of the character of the criminal. "If he was practising in general objective individualization, it was because the other did not respond to the ideas of the time and was scarcely surmised. Otherwise, nothing in the law would have prevented the judge of the old régime from anticipating Lombroso and applying in advance all the theories of the Italian School."¹ But instead the judge applied the penalty according to the crime and sometimes with the utmost rigor, regardless of the character of the criminal.

It was a time when people were hung for very slight offenses and it was this arbitrary rigor that called forth the protest from the eighteenth century philosophers. The ideas of these philosophers formed the basis of the French penal code which was formulated soon after the Revolution. This code went to the other extreme and fixed a penalty for each crime, leaving to the judge no opportunity for individualization of any sort. But with this code was introduced the jury and the jury was able to introduce some individualization into the procedure, notwithstanding the code. The code applied the punishment to each crime with mathematical regularity, without any consideration for the individual. But the jury saw before it a man whose fate was in its hands. It learned something about the life and character of this man and of the circumstances under which he committed his crime. With these facts in mind it could

¹ Saleilles: *Op. cit.* p. 46.

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not ignore the penalty which would inevitably be inflicted if its verdict was unfavorable. The result was that in many cases it lost sight of the crime and saw only the man whom it acquitted in order to save him from the penalty. This was individualization, but of a very unscientific and frequently anti-social sort. It displayed a humanitarian instinct but was sentimental and ill-regulated in its application. However, it contained the germ of this principle of considering the individual more important than his act in determining his penalty. The first attempt made to remove the evil results from this kind of individualization was in 1824 when a law was passed permitting the admission of extenuating circumstances in the case of certain crimes. These crimes were the ones in which the jury had given the largest number of acquittals, many of them having been very scandalous. But the power of admitting these extenuating circumstances was given to the judge. Consequently the jury could never be certain that they would be admitted and, as it frequently mistrusted the judge, the acquittals continued. As a result in 1832 the power of admitting extenuating circumstances was given to the jury.

This is the kind of individualization made by the jury by means of the expedient of extenuating circumstances in France and in most of the European countries. It is, however, very faulty, because it is almost entirely empirical in character, being based on a very slight knowledge of the individual,

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and because it is frequently determined by feelings of passion or of sentiment.

In America, from the very first, the idea of reforming the criminal has been very prominent. It resulted in the earlier part of the nineteenth century in experiments in the construction and administration of penitentiaries which attracted the attention of Europe. Later the indeterminate sentence, suspension of sentence, etc., were introduced. These changes were stimulated principally by private initiative and have been put into effect largely by private agencies. They have been inspired by humanitarian and philanthropic ideas which have led to works of social reform. These ideas have also frequently been inspired with a religious zeal for the moral regeneration and religious conversion of criminals. In this respect this sort of individualization is like that of the canonical law of the middle and dark ages as practised in the ecclesiastical courts. The judges of these courts believed that justice is in the hands of God and they had not the objective aim of adjusting the punishment to the crime committed, but the subjective aim of working for the regeneration of the criminal. The general tendency of these American reforms has been towards leniency. Rarely, if ever, has greater severity of treatment been advocated. Since emphasis has been laid principally on the criminal himself, these reforms have been developing a sort of individualization. But it has not been inspired by scientific ideas, consequently it has not been governed by science. Since little or no study

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has been made of the criminal it has been almost if not quite as empirical as the individualization made by the jury by means of extenuating circumstances. The aim of social defense against crime has been very vaguely conceived and therefore has had little practical influence, as shown by the almost universal tendency towards leniency.

It is evident that different sorts of individualization are being practised from different points of view. As a matter of fact most, if not all, the schools of to-day advocate individualization, though for varying reasons. As we have seen the new scientific school advocates it on account of the anthropological characteristics of the criminal and for the sake of social defense. Various schools advocate it for the reform of the criminal. Even the classical school has broken down the rigidity of its doctrine by admitting extenuating circumstances and a considerable number of cases of diminished responsibility. On account of the variety of reasons offered for individualization it will be necessary to study its principles in the light of the two previous chapters in order to have a satisfactory basis for a practical system of individualization.

As the word indicates, individualization is the process of adjusting a penalty to the character of a criminal. Three kinds of individualization have been distinguished, legal, judicial, and administrative.¹ Strictly speaking, there is no such thing as legal individualization. The legislator does not

¹ Saleilles: *Op. cit.* p. 15.

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know the individual for whom he is legislating and therefore cannot apply treatment directly. The term has been applied to laws which furnish a basis for individualization of other sorts, as for example, a legal classification of criminals according to their types. But for the application of this law to the individual criminal the intervention of another agency is needed so that it is best to drop this term entirely. We have then, two forms left, judicial and administrative. The first is the one with which this book is directly concerned, since it is the one exercised by criminal procedure, but the second is closely connected with it and the two must work together in order to form an effective system of individualization.

In the first place, it is necessary to diagnose the character of the criminal and then to prescribe the appropriate treatment. This must be done by the procedure and then the treatment must be put into effect by the penal administration. But the diagnosis and prescription made by the procedure cannot always be final because not enough is yet known about the criminal. The preliminary and tentative judicial decision must therefore be readjusted in the course of the treatment in accordance with the further knowledge acquired concerning the criminal. Let us now pass in review the stages of this process.

First of all is needed a criterion according to which the character of the criminal is to be judged in the course of the procedure. We have already rejected the criminal act as being an uncertain and

insufficient indication. The motive of the act next presents itself. This criterion is far superior to that of the act, since it is subjective in its character. It has formed the basis for the theory of parallel or dishonoring and non-dishonoring penalties.¹ These penalties are to be applied according to the motive of the criminal, the first series when the motive is dishonorable and discreditable, the second when the motive is creditable or, to say the least, not dishonorable. In the second class may be included political offenses, certain crimes of passion, the duel, certain crimes against sexual morality as in cases of rape when a girl has given herself voluntarily to her ravisher. Sometimes even theft and murder are committed with an honorable motive, while outrages committed during strikes and political uprising are not always discreditable. As non-dishonoring penalties, detention in a section of the prison separate from the other prisoners and under somewhat better conditions, exile, fines, etc., have been suggested. The usual forms of punishment would then become the dishonoring penalties. On account of their distinction from the other penalties they would be rendered all the more infamous. This character they are now losing because they are so frequently applied to crimes which the public conscience does not regard as infamous.

This is the theory of the parallel series of

¹ Cf. E. Garçon: *Les peines non deshonorantes*, *Revue pénitentiaire*, 1896, p. 830. C. Rigaud: *De l'influence du motif*, Paris, 1898.

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penalties which would individualize punishment in accordance with the motive of the crime. It is true that in the case of some crimes of the most heinous sort the motive is adequate evidence of the character of the criminal. But most cases are not so easy to solve. In the first place there is the great practical difficulty of determining what is the motive. This being in itself a very intangible thing and not always being revealed by the circumstantial evidence, it frequently remains in great uncertainty. Furthermore an individual not at all criminal in character may at times commit a crime with a very bad motive. On the other hand, a person of a criminal character may commit a crime with a good motive, but the crime may be one which could be committed only by an individual of such a character so that in such a case the act might in reality be a better indication of character than the motive. The motive like the act itself reveals usually only a small part of the personality during a limited period of time. It is an indication of character and may serve as a presumption on which to base further investigation, but is not a broad enough basis on which to decide the treatment to be prescribed.

Let us put ourselves at the point of view of the principle of social defense which has been described in the preceding chapter. From this point of view the sanction for punishment is the dangerousness of the criminal for society. The criterion of judgment is threefold, including the crime, social conditions and the criminal. In developing a criterion

of responsibility we have seen that the whole personality must be taken into account, including the intellect, volition, intimidability, etc. The same is true of individualization. No more than the responsibility can it be based on a single element of the personality as is done in the theory of the parallel penalties where the motive reveals only one element of the personality, the volition. We must, therefore, consider by what means a knowledge of this personality can be secured.

There is first of all the criminal act and its motive as far as that motive can be ascertained. Then there is the life history of the criminal, revealing his previous criminal record, if he has any, his education, his vocation, his manner of life, etc. Lastly there is all that may be learned by means of a physiological and psychological examination. And here the data and inductions of criminal anthropology already reviewed in the second chapter become of great practical value. We have seen that there is still much difference of opinion with regard to many questions in this science and that a satisfactory synthesis as to the origin and nature of the criminal has not yet been reached. But this does not vitiate the practical value of what has already been attained. The complexity which has been introduced into the theory by the discovery of numerous physiological causes furnishes a still broader basis for individualization of treatment. The fact that a criminal is a neurasthenic or a born criminal, an epileptic or a moral imbecile, is an important indication of the kind of treatment needed.

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As in medical science the therapeutics of a disease is frequently known before its etiology has been traced, so the right kind of treatment for a criminological type may be known before its origin or exact character has been determined. And as in medicine the therapeutic practise may lead to the discovery of the origin and exact character of a disease, so in criminology it is probable that only by means of the practical utilization of what is already known can a satisfactory theory be attained.

Having gathered this information about the personality of the criminal, in what way is it to be used in determining his treatment? His criminality may be looked at from several points of view, from that of its origin, of its type, and of its intensity.¹ From no one of these points of view alone can the treatment be determined, but all must be taken into consideration before a satisfactory decision can be reached. The origin of the criminality is a very important piece of evidence, when it can be determined, and must influence greatly the treatment. The fact as to whether the criminality is congenital or acquired, whether it is nervous or anatomical in its origin, may cause great changes in the treatment needed. At the same time two forms of criminality with very different origins sometimes require the same kind of treatment, as for example, when it is a question of total elimination the same kind of elimination will serve for criminalities having very different origins. In the second place the type of criminality or the kind of crime in which it results

¹ Saleilles: *Op. cit.* p. 250.

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must be considered. Garofalo has prepared a "rational system of penalties,"¹ in which the criminals are classified according to their types of criminality, with appropriate penalties for each type. But such a system is not certain to be accurate, because two criminals having the same type of criminality may have very different origins and therefore require different treatment. On the other hand criminals of the same origin may commit different kinds of crime and yet require the same kind of treatment on account of their similar origin. In the third place the intensity of the criminality must be taken into account, whether it is very profound and therefore incorrigible, or superficial and temporary and therefore reformable. These three points of view are by no means independent of each other, but on the contrary overlap each other more or less. It is true that criminalities of the same origin or of the same type usually need the same kind of treatment and to a less degree that is also true of criminalities of the same intensity. But all three must be taken into consideration before an accurate prescription of treatment can be made.

But there is a practical limit to the extent to which individualization of punishment can be carried. For financial reasons if for no other, it would be impossible to prescribe special treatment for each of the many thousands who are constantly passing through the courts, while such specialization would as a rule have no utility. It is, there-

¹ *La criminologie*, Paris, 1905.

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fore, necessary to establish a classification more or less detailed, based upon the three points of view designated above. The individualization would then consist in determining the class of each criminal. It is not possible to outline here such a classification and it is furthermore a penological problem, while here we are concerned with procedure, the machinery which is to utilize it. Such a classification should be developed out of the experience of the courts and of the penal administration, an experience tested and controlled by statistics of recidivation and of the amount of crime. However, in the latter part of this chapter recent modifications will be discussed which will suggest in part a system of individualization.

Such are the fundamental principles on which can be based a practical system of individualization. It is hardly necessary to state after the discussion in the last chapter that such a system is and must be entirely independent of moral responsibility. In general it may be said that in such a system the length of separation would depend on the readaptability to society. But there are certain objections to individualization which indicate further limitations.

The principal objection is that individualization results in an inequality of punishment for equal crimes. This seems like an injustice to many. As Tarde has said: "The misfortune is that to individualize punishment is to make it unequal for equal faults, and it is well to take into account the feeling of apparent injustice that this inequality cannot

fail to make the condemned or a large number of them and even the ignorant mass of the public experience."¹ As we have already seen, from the point of view of social defense justice does not require that the same crimes shall always receive the same punishment. Justice both to society and to the individual frequently requires that the punishment shall vary greatly in cases where the crime has been exactly the same. So that the injustice mentioned above is only apparent. However, if there is danger of many persons regarding individualization as unjust, measures should be taken to prevent this, since it would result in discrediting all criminal justice. It is possible that criminals do sometimes feel that they are being treated unjustly when others who are guilty of the same crime receive a lighter punishment. This would be obviated in part by the merit system, which should be included in every system of individualization. A criminal should be made to feel that the severity and duration of his punishment depends largely upon himself and that others get off with less punishment because they have earned it. But it would also be well probably if on the occasion of every sentence the judge would state publicly the reasons for the sentence, thus showing its justice, both to the criminals and to the public. The public might thus, in course of time, be educated up to the point of appreciating the justice of individualizing punishment.

¹ Introduction to *L'individualisation de la peine* of Saleilles.

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But it must not be forgotten that, as has been stated above, the criterion of judgment is threefold, including the crime and social conditions as well as the criminal. To forget these two other elements and to individualize with only the criminal in mind would be to ignore the object of social defense. In the preceding pages we have spoken a number of times of the prescription of treatment to criminals. This phrase reminds us of the medical treatment of the sick. And it is on account of the analogy between medical treatment and the individualization of punishment that the phrase has been used. But the analogy is not complete because in treating the sick there is usually only the individual to be considered, while in treating criminals there are social interests also to be considered. The analogy becomes nearly if not quite complete when the disease is contagious or is insanity, when temporary and sometimes permanent isolation is required. We must, therefore, consider what influence social conditions have upon the fixation of punishment.

There undoubtedly exists in the public feeling a desire to punish certain crimes with certain degrees of severity. Whether this desire arises out of a feeling of vengeance or that expiation is necessary or from any other source we need not discuss here. It has been suggested above that the public may be educated up to the point of accepting the individualization of punishment without demanding punishment for the crime. But it is sometimes contended that this demand has a social utility.

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Durkheim, speaking of punishment, says: "It does not serve or serves only very secondarily to reclaim the guilty one or to intimidate possible imitators of him; from this double point of view, its efficacy is very doubtful and, at any rate, slight. Its true function 's to maintain intact social cohesion by maintaining in all its vitality the common conscience. Denied so categorically, this would necessarily lose some of its power if an emotional reaction from the community did not come to compensate this loss, and there would result from it a loosening of social solidarity. This should, therefore, affirm itself emphatically at the moment when it is contradicted, and the only way of affirming itself is by expressing the unanimous aversion that the crime continues to inspire by an act which can consist only in a pain inflicted upon the agent.... This is why it is right to say that the criminal must suffer in proportion to his crime, why the theories which refuse to punishment all expiatory character appear to so many minds subversive of the social order."¹

It would seem that there must be some way of indicating the relative gravity of crimes by establishing a scale of crimes, according to their enormity. This may be done in the penal code. But a mere statement of this scale would not have much practical effect. It must be emphasized in some tangible manner which will strike the mind and attention of the public. We cannot, however, go

¹ *De la division du travail social*; 2d edition, Paris, 1902, pp. 76-77.

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back to fixed penalties. The case for individualization is too strong and it is evident that from now on punishment must be to a large extent individualized. Is there not, however, one respect in which the punishment can be adjusted to the crime in order to stigmatize it according to its gravity? When we review the penalties which are in use to-day we find that many different kinds have been introduced in recent years and that there is quite a variety of penalties which lend themselves to the individualization of punishment. But limits are still fixed to the duration of punishment and it is in the duration and not in the kind of punishment that we may be able to establish a gradation according to the crime. This does not mean that the duration must be absolutely fixed. This would, in fact, be fatal to individualization. But it is possible to fix for each crime a maximum or a minimum or both with enough distance between to admit of individualization.

In the preceding chapter has already been discussed how the standard of public morality can be raised by attaching to criminal acts penalties which make them seem more odious even to those who have no thought of committing them. It is difficult to determine to what extent punishment can do this and to what extent it should be allowed to encroach on individualization. The means suggested above may attain this end without putting too great a check upon individualization. This is a process of indirect intimidation. As we have seen in the preceding chapter the scope of direct

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intimidation is very limited and it can frequently be accomplished with individualization. But occasionally there may be a need for intimidation outside of individualization. Saleilles has suggested dividing penalties into those of *surety* for the incorrigible criminals for whom there is no hope of reform, those of *reform* for the criminals who may be reformed, and those of *intimidation* for those who are not at all criminal in character but have been led into crime by force of circumstances.¹ These last would serve only as a warning and as an indication of the criminal character of these acts. They would correspond to the non-dishonoring penalties discussed above. What penalties are best fitted for this purpose we cannot discuss here, since it is a penological question.

Keeping in mind, therefore, such limitations as may be put upon individualization by the necessity to intimidate and to stigmatize publicly certain acts as crimes, let us consider the means by which punishment is now being individualized. During the past century legislation has introduced a considerable variety of prisons such as asylums for the insane and inebriates, reform schools, agricultural colonies, etc. But these come under the penal administration while we are interested in the means of individualization administered by the courts.

The most important of these is the so-called indeterminate sentence. This sentence has, so far as the author knows, never been put into effect

¹ *Op. cit.* p. 240.

according to the strict sense of the term. That is to say, a law providing for a sentence entirely indeterminate has never been enacted. But many laws have been passed providing for indefinite or partially indeterminate sentences, which are usually called indeterminate sentences. The first of these was passed in the state of New York, April 24, 1877, and provided for the release on parole of prisoners from Elmira Reformatory before the end of their term of imprisonment. The indeterminate sentence is absolutely necessary for any reformatory system. This had already been insisted upon by Z. R. Brockway (the first superintendent of Elmira Reformatory, and the man who in large part made it what it now is), at the first National Prison Congress, at Cincinnati in October, 1870. In a report upon a true prison reform system he had said: "Sentences should be indeterminate; all persons convicted of crimes to be committed to custody until they may be returned to society with ordinary safety." Similar laws have since been passed in various other states for reformatories. The principle has also been extended to sentences to other kinds of prisons so that sentences to penitentiaries are frequently not fixed but vary between a minimum and maximum.

One of the principal characteristics of the indeterminate sentence is the appeal it makes to the criminal's self-interest. As Mr. Brockway has expressed it, "the supreme appeal to the prisoner's self-interest is made through the so-called indeterminate sentence, under which he may himself

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shorten or lengthen the period of his imprisonment.”¹ In the reformatories the release is determined principally by the progress the prisoner makes in learning a trade, and in his school work. In the penitentiaries the release is principally determined by the conduct of the prisoner, a record of which is kept by marks and a system of grading. It is questionable whether this last is a good criterion of the fitness of the criminal to be liberated. The worst of criminals frequently have the best conduct in prisons. The criterion for liberation should rather be the character of the criminal and the reformatory system is much more likely to judge this aright. However, these are penological questions and we are now interested in the indeterminate sentence in its relation to procedure.

The system of fixed penalties determines the duration of punishment before anything is known about the criminal so that individualization in the duration of punishment is made entirely impossible. Under the old régime in Europe the judges had absolute power over the duration of punishment. Here was the opportunity for individualization by the judge. But even with the most thorough-going examination of the prisoner the judge cannot have the knowledge of the criminal which comes only from an observation of him through a long period of time. It is the indeterminate sentence which makes it possible to base the

¹In the *Reformatory System in the United States*, edited by S. J. Barrows, Washington, 1900.

decision of the duration upon this knowledge. The information secured in the course of the period of imprisonment is gathered by the prison management. But should the decision with regard to the release be made by this management? In the case of most, if not all of the reformatories, this decision is made by a board composed in part or entirely of members outside of the prison management. It has also been suggested that this power should be given to the judges who would exercise it by means of the periodical revision of sentences. In this latter case the power of determining the duration of sentences would be a part of the procedure and therefore requires a discussion in this book. But inasmuch as other questions concerning procedure will have to be decided before this matter can be thoroughly discussed, its discussion will have to be postponed to the latter part of this book. In passing, however, we may note that by thus placing this power outside of the prison administration a check is put upon its work, thus answering the criticism made by Tarde,¹ that the indeterminate sentence would put too much power in the hands of the prison keeper.

Another recent modification which tends towards the individualization of punishment is the suspension of sentence by means of which a criminal is released from all punishment on condition of good behavior in the future. Like the indeterminate sentence, this reform also originated in America. It was first introduced for juveniles under the

¹ *Revue pénitentiaire*, Paris, 1893.

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name of probation in Massachusetts in 1869, and for adults in Boston in 1878. Since that time it has been introduced in many other states. In England the "Probation of First Offenders Act" was passed August 8, 1887. It is also known as *conditional release* in England which is a rather misleading name since it may be confused with the conditional liberation of criminals who have served a term of imprisonment. It was first introduced on the continent in Belgium by the Le Jeune law passed May 31, 1888, and was introduced into France by means of the Berenger law passed March 26, 1891, where it is known under the name of *condamnation conditionnelle* or *sursis*. It has since been introduced into various other European countries such as Portugal, Norway, Luxemburg, etc. Unlike the indeterminate sentence the suspension of sentence is administered entirely by procedure and therefore merits a careful consideration.

Suspension of sentence is practised under several different forms. In America the power of suspending sentence, which belonged to judges under the common law, has been made very extensive so that in some states, as, for example, in New York, a judge may suspend sentence in the case of almost every crime, no matter how grave. There are, however, various precautions taken against the abuse of this privilege by the criminals. The sentence is suspended only on condition of good conduct during the rest of their lives. Thus if the judge at any time has reason to believe that a

criminal whose sentence has been suspended is not leading an honorable and useful life, he can summon him to court and inflict the penalty originally suspended. Also, if the criminal is convicted of another crime, the original penalty can be inflicted in addition to the penalty for the new crime, for which he is treated as a recidivist. A further precaution is the work of the probation officer in whose custody the criminal is usually placed and who watches over him for a certain period of time after his release. The work of this officer will be discussed a little further on.

In England, no surveillance is kept over the criminal after he is released on condition, but he is forced to give a bond for good conduct which acts as a restraint upon him. A similar system exists in Massachusetts, where the probation officer has to act as surety for the good conduct of the criminal, thus stimulating the vigilance of the officer.

On the Continent no surveillance is exercised and there is no bond for good conduct. The suspension of sentence is sacrificed only in case of a new crime. But, on the other hand, the power of suspending sentence has on the continent been given very little extent since it is limited usually to sentences of no more than six months. It can, therefore, be applied only to offenses not very grave in character.

Suspension of sentence is granted usually only to first offenders even when this is not expressly required by the law. The underlying theory is that those who are not criminals by birth or habit,

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but who have committed crime through force of circumstances, shall be given an opportunity to retrieve themselves, to begin life over again. It is very evident that this is an attempt to individualize punishment. Let us see how well it works out in practise. In this, as in every form of individualization, a knowledge of the character of the criminal is needed. But how thoroughly does the judge who applies suspension of sentence know this character? Since criminal procedure is intended to determine the kind of a criminal act committed and not to reveal the character of the criminal, it is only incidentally and by chance, as it were, that in the course of it the judge comes to learn anything about this character. And it is on the basis of this very small amount of knowledge that he has to make his decision. The result is that he gets into the habit of granting suspension of sentence according to the circumstances of the crime and not according to the character of the criminal. Thus under one set of circumstances he will almost always grant the suspension, while under another set of circumstances he will almost invariably refuse it. At other times he will not be absolutely certain of guilt and will therefore grant the suspension as a sort of a compromise. Thus we see how very difficult it is in the existing procedure to put into practise the suspension of sentence, however excellent it may be in theory.

The judge is better able to make his decision when he is aided by a probation officer as is usually the case in America. He can then remand the

prisoner, after conviction, without imposing a sentence immediately and direct the officer to make an investigation. This the officer does by talking with the prisoner and getting his story and then verifying this story by visiting his home, the places where he has worked, etc. Very frequently also he sees the plaintiff and learns as much as possible about the circumstances under which the crime was committed. The information thus gathered he reports to the judge, frequently with a recommendation as to the best way of disposing of the case. It is evident that with this information the judge is in a much better position to make his decision than without it. Also by means of the probation officer the judge is able to keep in touch with the criminal after his release and to impose the sentence if the criminal proves by his conduct that the confidence of the judge in him has been misplaced. But even the probation officer is forced to base his recommendation to the judge on external circumstances. It is true that when talking with the criminal he is able to get some impression of his character. But in the first place, the officer has not had the training in criminal anthropology which would enable him to appreciate the significance of such anthropological characteristics as are outwardly apparent while even if he had this training he would not have the opportunity of making the physiological and psychological examination necessary for a complete knowledge of these characteristics. Thus again we are brought face to face with the fact that the existing procedure is

not adapted to revealing the facts about the character and personality of the criminal which are essential for individualizing punishment.

However, notwithstanding its limitations, the probation system has its utility as a substitute for something worse and as preparing the way for something better. As has been said, it is especially fitted for occasional criminals. It may also frequently be used for juvenile criminals. Suspension of sentence is a good substitute for correctional punishment or imprisonment for short periods of time. These penalties are likely to do a great deal of harm to young and occasional criminals by putting them under corrupting influences. They can, besides, have but little utility for such criminals, so that it is as a rule better to release them especially if they can go out under the care of a probation officer.

The utility of suspended sentences depends somewhat on local conditions and temperament. It is not always best for the criminal to be returned to the environment in which he has committed his crime. Furthermore his release is likely to have a bad effect on others who are more likely to commit crime, because they have seen him return unpunished. In some cases, also, the plaintiff is incensed that the person who has injured him has not been punished and may take the law into his own hands, in revenging himself. It was the frequency of such acts in Italy, probably, which led Garofalo to advocate that the consent of the injured party should be necessary before the

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suspension of sentence could be granted.¹ This is too important a power to be put into the hands of private persons and would furnish the opportunity for the manifestation of feelings of vengeance. But another element should be introduced into the suspension of sentence which would in part if not wholly counteract these tendencies towards vengeance on the part of plaintiff and which would, furthermore, only be an act of justice to those who have suffered from the crime. The criminal should be forced to pay damages to the injured party, this being a condition of his release. If the damages are too large, he should pay in proportion to his ability. At present the plaintiff is forced to commence a civil suit for damages, which is a costly and uncertain proceeding. It is only just to him and the effect on the criminal will be most salutary to make this payment a condition of release. As a matter of fact in America, where the judges have a power over the criminal after release, they frequently make restitution a condition of release, instructing the probation officer to see that the restitution is made while they threaten the criminal with the execution of the sentence if he fails. Thus it would be but one more step to organize this and make it a regular part of the criminal procedure.

The probation system has been developed in America largely by private philanthropic agencies. A good deal of the work has been done by volunteer workers who have been very well-meaning, but,

¹ *Bulletin de l'union internationale de droit penal*, 1899.

many of whom, on account of lack of experience and a rather sentimental point of view, could not be very efficient. Probation work has also been done by policemen who, on account of their lack of education and prejudiced attitude towards criminals, are peculiarly unfitted for such work. Probation work should be done by intelligent and experienced officers who are employed by the state and devote all their time to this work. It would then be done as efficiently as possible under present conditions. We have seen what are the limitations of probation work in the existing system of procedure. In the following chapters of this book will be outlined a system of procedure peculiarly adapted for gathering all possible information about the character of the criminal and therefore for individualizing punishment. In this new system, as we shall see, some of the functions of the probation officer will be taken over by the public defense, which will be an important element in the system, and will be performed much more effectively by it. The functions which will be left behind, strictly speaking, to the penal system and will be taken over by it when that system is reorganized.

A forerunner of suspension of sentence was the judicial admonition. This was known in the Roman law as the *severa interlocutio*, in canonical law as the *monitio canonica* and in ancient French law as *correction par la bouche du juge* or *blâme*. It reappeared in modern times in the Bavarian code of 1813, in the Sardinian code of 1841, in

Piedmont in 1859, and has existed recently in the two Sicilies, Turkey, Spain, Portugal, Russia and the Swiss cantons of Vaud and Appenzell.¹ In a recent Italian code it was called "judicial reprimand" to distinguish it from the admonition of the police. The judicial admonition consists in the release of prisoners in the case of crimes of small importance with no more than a warning from the judge. It is evident that this warning can have but little effect. As Ferri has said: "Either the condemned is in reality an occasional delinquent sensitive to honor, and then the penal judgment alone will serve him as a lesson, without it being necessary for the judge to address to him a little moral discourse or a sermon; or this moral sensitiveness is lacking in the condemned, and then the words of this reprimand are lost; it can have no useful effect either upon the guilty one or upon the public."² Suspension of sentence is much more effective than this admonition especially when it is accompanied with the probation system. As a matter of fact in America, where the judges are able to retain a surveillance over those released on suspension of sentence, they usually accompany the release with an admonition.

In France, by means of the rehabilitation, the function of the procedure is extended beyond the expiration of a sentence which has been served in prison. Two kinds of rehabilitation exist. The

¹ Le Courbe in the *Revue pénitentiaire*, Paris, 1891. F. Dreyfus in the *Revue pénitentiaire*, Paris, 1890.

² *Op. cit.* pp. 611-612.

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first is legal in which, after a certain time has elapsed after the expiration of sentence, in the case of certain crimes the record of the condemnation is effaced without any action being necessary on the part of the criminal, provided there has been no recidivation. The time which must elapse depends upon the length of the sentence and is usually several times as long as the sentence. The other form of rehabilitation is judicial. In the case of certain crimes after being released on conditional liberation if the condemned has lived for three years in the same *arrondissement* and two years in the same *commune*, he may make application for rehabilitation. Those who have served in the army or whose business has prevented a fixed residence must secure attestations from military superiors in the first case and certificates of good conduct from employers and others in the second case. The condemned must have paid all fines and damages required of him and must pay the expenses of his appeal for rehabilitation unless he can prove his inability to pay any or all of these. The public prosecutor makes inquiries about the residence, the conduct, and the means of existence of the condemned of the mayor, the justice of the peace and the under prefect. Then the court of appeal after having heard the prosecutor and the counsel of the condemned decides. If the request is rejected it can be repeated in two years. If it is accepted the record of the conviction is effaced from the *casier judiciaire* of the condemned.

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This is what gives importance to the rehabilitation. The *casier judiciaire* exists in France and several other European countries. It is a judicial record which is kept of every native inhabitant at the place of his or her birth. At first it gives the name, time and place of birth and occupation. Then if a person is convicted of a crime anywhere, notice of it is sent to his birthplace, where it is recorded in the *casier judiciaire*. A copy of this is also sent to Paris where copies of the *casiers judiciaires* of all the criminals in France for nearly a century are kept on file in the *Palais de Justice*. An individual can secure at any time a copy of his *casier judiciaire* and when seeking employment it is usually necessary to show it. A criminal record will, of course, greatly injure one's prospects of securing employment. That is why a condemned person is anxious to secure rehabilitation, in order to have this record effaced from his *casier*.

The utility of the *casier judiciaire* has been discussed a good deal. It helps somewhat in individualizing punishment by making it impossible for a condemned person to hide a criminal record. For the same reason it is an aid to the police. But it also stigmatizes the criminal going out from prison and thus makes it harder for him to get started in an honest career. It is most easily administered where the government is thoroughly centralized as in France and therefore could with difficulty be installed in a country like the United States where the government is much decentralized.

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In nothing has individualization been carried so far as in the treatment of juvenile criminals. It is probable that they have always been treated somewhat differently from adults. Their immaturity and lack of knowledge have made it impossible to hold them as strictly accountable for their acts as adults. Furthermore, their dependence upon their parents and subjection to parental control has given them a peculiar legal status. In recent years the idea has been growing that, because his character and habits are not fixed, it is possible to reform the young criminal and that therefore penal treatment should be adapted to this purpose rather than to punishment. The importance of such reformation for society has been very evident.

The principal change which has been made in the legal status of the juvenile criminal has been with regard to his penal responsibility. Most legislations now assume that all criminals under a certain age, usually sixteen, have committed their crimes without discernment or at least admit of the proof of this on the ground of youth. The penalties are then adjusted according to whether or not discernment has been proved, in both cases the penalties being less severe than for adults. In some legislations an age still lower is designated under which no child can be presumed to be responsible. Any treatment then given is with no punitive object whatever. But even this has not been satisfactory and it has been contended that the division should be carried still further in order to permit of a more detailed classification of juve-

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nile criminals. One writer has suggested the following division: "Under the age of seven years, children will never be prosecuted, they will be only the object of admonitions and will be always returned to the parents, without any appearance in court....Up to the age of twelve years, the child will always be considered as having acted without discernment; from twelve to sixteen years, the judge will have to determine if there is discernment or not; finally, from sixteen to eighteen years, the question of discernment can be raised, aside from which, whoever has been declared to have acted with discernment will be considered as an adult and, consequently, as fully responsible for his acts."¹

On account of the great importance of individualization in the treatment of juvenile criminals all consideration of responsibility should be abolished, not only moral but personal responsibility, and treatment should be prescribed in accordance with the needs of each particular criminal. It is, the author believes, possible to do this because of the difference in the public attitude towards the child and towards the adult criminal and because of the much greater utility of educational and reformatory agencies than intimidatory punishment in the treatment of children. It is this public attitude and the realization of the utility of these agencies which have caused, as already indicated, the changes in the procedure and penal treatment for juveniles. But these changes must be carried much farther to arrive at the requisite degree of individualization.

¹ L. Albanel: *Le crime dans la famille*, Paris, 1900, p. 189.

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The principal changes in the procedure for juveniles have been those caused in America by means of the juvenile courts. These courts have grown out of the probation system which, in most states where it exists, was intended at first for juvenile cases and which in some states is still limited to these cases. Since the introduction of this system caused some changes in the procedure, the juvenile cases were usually tried apart from the other cases. This in turn resulted in special legislation with regard to the procedure to be followed in juvenile cases. It is not possible to give a definite description of a juvenile court on account of the differences in the legislation in the twenty or more states where special provision has been made for juvenile trials. As a matter of fact the juvenile courts exist in varying stages of development. In some places they have not yet got beyond the initial stage of simply trying juvenile cases at a different hour from the adult cases, though in the same room and by the same judge. It may be questioned whether these are juvenile courts as distinguished from the other criminal courts. In other places the juvenile cases are heard in a different room or building, usually by judges specially designated for this purpose. The procedure and its scope also vary in different degrees. It will, therefore, be worth while to discuss only the general characteristics of the juvenile court movement in order to determine to what extent the treatment of juvenile criminals has been individualized.

As has already been stated the juvenile cases are

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separated from the adult. This is done in order to save the children from being corrupted by older criminals and also to emphasize the peculiar problems involved in juvenile cases. An effort is usually made to lessen the publicity of the proceedings, sometimes by holding the trials in the judge's chambers or in a small courtroom. The object is in some cases not to alarm the child, in others not to stimulate his vanity by making him feel that he is in the public eye. Legal formalities are dispensed with as much as possible. A jury is not generally used though the law frequently requires that one shall be at hand to be used when necessary. Lawyers are used very little. Frequently a public prosecutor is not present and the form of a trial is dispensed with. In other words a trial, strictly speaking, is not held. This is possible because usually the crimes of children are petty and are committed with more or less publicity. The child will usually admit its act with a little questioning and a witness or two can prove its character. A trial can therefore be dispensed with and the judge merely conducts an examination to determine the cause of the offense and the circumstances and character of the child as much as possible. His principal agent in this work is the probation officer. Everything is done to remove from the proceedings their criminal character. It has even been suggested that a juvenile court should not be a criminal court at all. "Jurisdiction in cases arising under the act should be given to a court having common law chancery powers—not a criminal

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law.”¹ It is easy to see that in these courts the question of responsibility is hardly ever raised, showing the practicability of the suggestion made above that the idea of responsibility as a sanction for punishment be abolished entirely from the treatment of juvenile criminals. In these courts in practise, if not in theory, the age under which a child cannot be found guilty of a crime, which according to the common law is seven, is raised to the age limit for juveniles which usually is sixteen. Thus the field is left entirely clear for individualization.

It is evident that the efficiency of such a court must depend largely upon the judge. In his hands is put a great deal of power which he is free to use arbitrarily. Consequently he should be well acquainted with juvenile criminals and crime in order to be able to judge cases wisely. This is why it is frequently contended that the juvenile court judge should serve continuously. When he comes to the juvenile cases from the trial of other cases, he is likely to bring with him a legal point of view which is out of place in a juvenile court. Continuous service will develop in him the right attitude and will give him the necessary experience. Furthermore, the authority of the judge over the children does not end with the decision of the cases, but it continues as long as they are on probation or in the institutions from which they can be discharged only with his permission. It is, therefore, essential that he should be acquainted with the history of

¹ Harvey B. Hurd: in *Charities* for January 7, 1905.

each individual case under his authority, from its beginning.

The methods of treatment are varied. If possible, the child is left in the family under the supervision of a probation officer. But this is not always possible, sometimes because the child is incorrigible and cannot be controlled by its parents, sometimes because the family life is bad for the child on account of the viciousness of the parents or for some other reason. The child is then sent to the institution which is best fitted to give it the education and discipline it needs. The length of detention is usually indefinite, the maximum limit being the age of majority of the child, which is usually twenty-one years.

This brief description shows to what an extent the juvenile court movement has individualized the treatment of juvenile criminals. It is evident that in these cases the crime has come to be almost entirely ignored. The judicial treatment of young criminals has come to be in some places an agency of the educational system. And this is an excellent solution in many cases. But there is danger of forgetting the true significance of the crime. As we have seen in the second chapter the crime is frequently the sign of congenital abnormality in the criminal, such as congenital criminality, epilepsy, moral imbecility, etc. When such abnormality is the cause of crime in the child, society needs to be protected against it as much as when it manifests itself in an adult. Juvenile courts now sometimes use medical skill in determining the treatment

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needed. But more than that is necessary. The services of an expert in criminal anthropology should be at hand to diagnose the criminal tendencies of the child in order that the appropriate measures of social defense may be taken against these tendencies. It is, therefore, the defense of society which must not be forgotten in the treatment of juvenile criminals. Society must be guarded against anti-social tendencies which are as dangerous in the young as in the adults, though not always so immediate in their dangerousness. And at times individualization may have to be sacrificed in the interests of social defense.

The tendency of the juvenile court movement is to separate entirely the procedure in juvenile cases from the procedure in other criminal cases. The question may be raised whether this distinction will always remain. The juvenile courts are by no means what they ought to be. But the old procedure should not be returned to, since it was still less fitted for dealing with juvenile criminals. The chief significance of the juvenile court movement is that in breaking away from the old procedure it is preparing the way for a new procedure for adults as well as for juveniles. A similar idea was expressed in one of the resolutions proposed by Van Hamel and adopted at the Congress of Criminal Anthropology at Turin in 1906. "From a theoretic as well as from a practical point of view the treatment of young criminals can and ought to

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be the prototype for the treatment of adults.”¹ The juvenile court movement should lead the way to a procedure based on a scientific knowledge of the criminal and of the causes of crimes such as can be gained only through the sciences of criminal anthropology and criminal sociology. When that time comes it may be found that the procedure for juveniles and for adults need not differ so very much. It may prove best to have the same judges try both kinds of cases. Just as a doctor, in order to understand the diseases of adults, needs to know something about the diseases of children and vice versa, so it may prove that a judge to be able to judge juvenile criminals will need to understand adult criminals and vice versa. On the other hand, a certain amount of specialization may prove advisable as in the medical profession. These are questions which cannot be decided now. The main thing is to regard the present distinction between procedure for juveniles and procedure for adults as not necessarily permanent or the present stage of development as final.

The same thing is to be said of all the recent modifications in procedure, some of which we have briefly reviewed. Their principal significance is that they are preparing the way for greater changes in the future. Most of these modifications were originated by means of the initiative of private agencies inspired usually by philanthropic or religious motives or both. The administration of

¹ *Archives de l'anthropologie criminelle et des sciences penales*, June, 1906.

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these modifications also has been carried on largely by private agencies. As we have seen, the work done by them has lacked a scientific basis so that it has resulted in a failure to discriminate between different classes of criminals. Its general tendency has been towards leniency. While this work has revealed a warm heart it has not always been accomplished with the best of judgment. But it has shown the faults of the old system and has given impetus to the movement towards a new one. This has resulted in a large claim for public support for these modifications which has caused in many states the appropriation of money for the support of probation systems, of juvenile courts, etc. It, of course, goes without saying that the treatment of criminals, which is of the greatest social importance, should be supported and administered by public agencies. The danger to be avoided in this particular instance is that of adopting changes in too rigid a form before their real value has been proved. It would be well if every government would provide for the scientific study of criminological problems with a view to putting criminal procedure and the penal administration on a scientific basis. This is the ideal way of bringing about such changes. But governments are slow to take these measures and it has, therefore, been left to private agencies to take the initiative. Now that the initiative has been taken, it is incumbent upon the public authorities to adopt or reject the proposed changes. Before, however, any decisive action should be taken, a

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careful study should be made of each modification in order to be certain of its utility. In some cases where a modification has not been sufficiently tried, it may be best to leave it for a while longer in private hands where on account of its flexibility it can be more easily experimented with. Thus private agency would play the same part in the treatment of criminals that it has played in many other social problems, namely, that of introducing and testing innovations before their adoption by public authorities.

We now can see how strong is the tendency towards the individualization of punishment. It is evident that the day of fixed penalties has passed forever. This principle which was the cornerstone of the classical theory had its utility in a day when the people were fighting for political liberty against absolutism, but is now historically out of date. From now on, individualization will be one of the guiding principles in the treatment of criminals. But we must not forget that it must be an individualization adjusted to the needs of social defense. Though usually the two go hand in hand and individualization is one of the principal weapons of the social defense, still at times it is necessary to sacrifice individualization, whether for intimidation, in response to public demand, or to uphold the existing standard of morality, and to determine the penalty according to some other criterion.

In this chapter we have been discussing judicial individualization in particular, because that is the kind exercised by procedure. But this must be

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combined with administrative individualization in order to make a complete system of individualization. This second kind is exercised by the penal administration and therefore does not come within the scope of this book. In a future chapter will be discussed the means of connecting the two so as to form one continuous system.

It is not yet possible to outline a complete system of individualization. In the first place a classification of criminals from the point of view of social defense is needed. Secondly, there must be a classification of penalties or methods of treatment corresponding to this classification of criminals. Let us see before closing this chapter, what suggestions can be made for the construction of such a system. As a basis for the classification of criminals we have the fundamental distinction between occasional criminals and habitual and born criminals. Each of these divisions can, of course, be divided into many sub-divisions. In order to individualize the punishment of occasional criminals it is necessary to abolish correctional punishment in general except where it may be necessary to retain it for social defense. This form of punishment which is usually imprisonment for short periods according to the nature of the crime usually does no good to the criminal and sometimes does a great deal of harm by putting him in the corrupting atmosphere of a prison. In place of correctional punishment the payment of damages can be substituted where the crime reveals no bad

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motive or tendency towards crime. Where the motive is bad or there is any reason for suspecting a tendency towards crime, to the payment of damages should be added suspension of sentence and probation for an indefinite period until there is no further reason to fear crime. For the habitual and born criminals the indeterminate sentence within such limits as have been indicated above exists. For those who by persistent recidivation or by the peculiar nature of their crimes have proved themselves criminals there exist several methods of elimination such as imprisonment for life, transportation or death.

CHAPTER V

CRIMINAL LAW

The English common law furnishes the basis for the criminal law of England and of most of the United States. This system of law was developed by means of decisions rendered by judges in the course of several centuries. It is, therefore, essentially practical in its character since it has arisen out of concrete cases. And as it is still based in a large measure on judicial decisions, especially in England where nothing has been done to codify the law, there has been little inducement to search for a theoretic basis for the common law. English and American jurists and legal writers have concerned themselves very little with the philosophic aspect of the principles they have studied, being principally interested in tracing them to their origin in judicial decisions. This is quite in contrast with Continental jurists and writers who have always paid a great deal of attention to the philosophic aspect of legal principles. This was noted a good many years ago by a distinguished American jurist, Justice Story: "There is a remarkable difference in the manner of treating judicial subjects between the foreign and the English jurists.

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The former, almost universally, discuss every subject with an elaborate theoretical fulness and accuracy, and ascend to the elementary principles of each particular branch of the science. The latter, with few exceptions, write practical treatises which contain little more than a collection of the principles laid down in the adjudged cases, with scarcely any attempt to illustrate them by any general reasoning, or even to follow them out into collateral consequences.”¹ It has been a great loss to our law that it has not been treated in this philosophic spirit. This treatment would be a valuable criticism of some principles, in the case of others it would greatly broaden their application as indicated by Story. Especially true is this of criminal law which should always keep the pace with the sciences and philosophy which deal with social relations. The fundamental nature and the ultimate object of criminal law should always be kept in view and its applications always adjusted to the current conception of this object. This is constantly being done on the Continent. “It is likewise in those countries where many would make us believe that life, liberty and property are not as sacredly guarded as in our own country, that the criminal laws are a constant object of scholarly study and investigation. The great progress made in the study of crime, the building up of a criminal science and a criminal sociology, is almost exclusively the work of Continental criminologists.”²

¹ Quoted in the preface of *History of the Trial by Jury*, by Wm. Forsyth, London, 1852.

² Gino C. Speranza: *The Decline of Criminal Jurisprudence*

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It is time that such a study of our criminal law was made. An exhaustive study of this sort does not come within the scope of this book but inasmuch as modern systems of criminal procedure and penal codes are based upon and very largely determined by the fundamental principles of criminal law it will be necessary before commencing our study of procedure to review briefly these principles as illustrated in European law in general and in our own law in particular. In this review will be indicated the positive value of these principles in accordance with the positive principles which have been elucidated in the preceding chapters.

The leading principle of modern criminal law is the one expressed in the famous axiom, "*nullum crimen, nulla poena sine lege*," or, as it is sometimes expressed, "*nulla poena sine lege criminali*." This axiom means that no one can be prosecuted for an act which has not been made a crime by law before its commission. It is unnecessary to give here an exhaustive historical account of this principle from its origin. As we have seen in the preceding chapter, before the French Revolution the judges had an almost unlimited power which they exercised most arbitrarily. Saleilles, after stating that this principle was not recognized in the ancient law continues as follows: "There were, however, certain texts of laws fixing some penalties as sanction of an act foreseen and specially incriminating, some customary texts, royal ordinances

in America, in the *Popular Science Monthly*, New York, February, 1900.

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above all.”¹ This shows that only in exceptional cases was this principle applied. The eighteenth century philosophers reacted strongly against the arbitrary power of these judges and its tyrannical use. Beccaria states their position as follows: “As each magistrate is himself a part of society, he cannot, with justice, inflict a punishment upon another member of society, if it is not already fixed by law. . . . The criminal judges have therefore as much less the right to interpret penal laws as they are not themselves legislators.”² The principle was applied by the French National Assembly immediately after the beginning of the Revolution in the famous declaration of rights of August 26, 1789, and again in the famous law of January 21, 1790, which is the basis of French penal legislation. The principle had already been recognized in the section of the American Constitution forbidding *ex post facto* legislation. It is now recognized in all modern penal legislation. ✓

What then is to be said of this principle from the positive point of view? Broadly speaking, it must, of course, be accepted. We can never again have judges responsible only to a king or, as the ecclesiastical judges claimed, only to God. The power of the judge must be legal. That is to say, it must be conferred upon him by a law passed by the people or by the legislature, as representing the people. The judge is then responsible to the people from whom he derives his power. Looked at in this

¹ *L'individualisation de la peine*, Paris, 1898, p. 46.

² *Crimes and Punishments*, Chaps. III and IV.

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light this is an important democratic principle which must be always safeguarded as a protection against tyranny.

But when we come to the practical application there may be a difference in the way of interpreting it. The first part of the axiom "*nullum crimen sine lege*" looked at from a very general point of view cannot be denied. It would not be safe to give to the judge unlimited power in deciding what is a crime. The legislative power must always indicate against what acts as crimes society reacts. Otherwise social defense would become no more than the expression of the private standard of morality of the judge. Furthermore the police would not know against what acts to take action as being criminal. But while the law must indicate what acts are criminal there may be considerable variation in the extent to which the acts are to be classified. After the French Revolution the tendency was to classify crimes in great detail. The same is true of the common law. In the latter part of this chapter we shall discuss a much more general classification of crimes. According to such a classification each crime would still, in accordance with the principle under discussion, be foreseen and designated by the law, but the relative importance of crimes among themselves would be left in a large measure to be determined by the judge according to certain standards which will be discussed later.

The practical application of the second half of this axiom, "*nulla poena sine lege*," may be very

much changed. The penal code adopted after the French Revolution reacting against the arbitrary power of the judges fixed absolutely the penalty for each crime. But this code was not successful on account of the jury which insisted upon giving its verdicts in accordance with the penalties which they would entail. As a result extenuating circumstances were introduced and the penalty was no longer absolutely fixed by the law. As we have seen in the preceding chapter the tendency is towards the individualization of punishment so that this principle can no longer be applied in any rigid manner. But this does not mean that the principle is to be denied. Punishment cannot and ought not to be inflicted under any circumstances which have not been foreseen by the law though the law may not specify the exact amount and character of the penalty in each case.

Thus we see that the positive point of view does not deny this principle though it changes greatly its practical application and also lessens its practical importance. Von Liszt speaks of it as follows: "The double adage: *nullum crimen sine lege, nulla poena sine lege*, is the rampart of the citizen against the omnipotence of the State. For a long time I have characterized the penal law as the repressive power of the State legally limited." This remark and its context would seem to indicate that the writer views very critically this principle. It is true that when rigidly applied this principle limits and in fact almost paralyzes the social defense against crime. But when applied as we have

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indicated it loses this tendency. The theory of this principle must always be retained not only as a protection of the individual against society as Von Liszt has intimated, but also of society itself against those who may attempt to exercise an unwarranted and tyrannical power. The penal law as expressing the will of society must sanction every criminal prosecution and every penalty imposed however much latitude may be given within the law to its execution and the application of penal treatment.

A logical deduction from this principle is that penal law is non-retroactive in its effect. It is evident that no act committed before the enactment of a law can be prosecuted under that law since it did not foresee it. One exception, however, is made to this rule. When a new law abolishes a crime or diminishes its penalty this law may be applied to the benefit of those who have committed the offense before the enactment of the new law but who have not yet been tried. It may even be applied to the benefit of those who have already been sentenced. There are various practical reasons in favor of this exception, as, for example, the feeling of injustice among the public at seeing an act punished which is no longer called a crime.

Another fundamental principle of modern criminal law is that it should be restricted to social interests. Under the ancient régime individual liberty was violated in many ways as, for example, by laws creating offenses against morality and religion. But the French Revolution proclaimed the

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liberty of religion and conscience and the restriction of penal law to the sphere of social interests. Theoretically, this principle is quite in accordance with the positive principle of social defense though in practise it has been applied very differently. This principle is now pretty generally accepted though some exceptions to it are still to be found. For example, in the English law it is provided that anyone "who having been educated in or at any time having made profession of, the Christian religion within this realm, by writing, printing, teaching, or advised speaking, denies the Christian religion to be true, or the holy scriptures of the Old and New Testament to be of Divine authority"¹ is guilty of a misdemeanor. This principle, however, is not in harmony with certain other principles which are as widely accepted. The classical school started out with the principle that penal law should be limited to social interests which correspond to the positive principle of social defense. But this principle gradually developed into that of the defense of the judicial order. The object of this order is the administration of an absolute justice. As Garofalo says of this school, "it justifies punishment by the necessity of defending the rights of the citizen, but it adds to this social necessity a regulator or moderator, *justice*, as a foreign element, come from without, something superior to social necessity. The jurists glide thus into metaphysics, for they search for this regulator elsewhere

¹ *A Digest of the Criminal Law*, J. F. Stephen, London, 1904, p. 127., Art. 181.

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than in social necessity itself.”¹ Another principle which has a great deal of influence is that punishment is a moral compensation for the harm caused by the crime. These two principles interfere with the logical application of the principle that penal law is limited to the sphere of social interests.

Another principle, in part derived from this one, is that the penalty must be determined by social necessity. This is in accordance with the positive principle of social defense. But these two principles of absolute justice and of moral compensation prevent it from being put into practise. As we have seen in the preceding chapters, social necessity requires that punishment should as a rule be determined by the character of the criminal. But in order that absolute justice should be attained and that moral compensation for the ill done should be made, punishment has been adjusted to the crime committed instead of to the criminal. The result has been described by Prins in the following words: “For it (the classical school) the delinquent was not a living and acting man, but an abstract type, conceived by pure reason outside of real life; for it the offense was not a part of this real life, but a juridical formula, inscribed in a code; for it, the penalty was not a social defense adapted to the attack, but a theoretic system conceived by scholars who did not take into account the nature of the delinquent.”²

¹ *La criminologie*, Paris, 1905, p. 298.

² A. Prins: *Les doctrines nouvelles de droit penal*, University of Brussels, 1895-1896.

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Penal responsibility has been based on moral grounds instead of upon the dangerousness of the criminal which is the only logical basis in accordance with the principle of social defense. But opinion on this subject is beginning to change. Even an advocate of moral responsibility speaks as follows: "People are beginning to realize that in human actions and in the genesis of crime other things must be considered besides free will. One must place beside the latter the influences of environment, of heredity, of temperament, of climate; and these are difficult to determine. It cannot be denied that the moral sense is lacking in a large number of criminals, so that for this minority at least responsibility is only a fictitious term, a conception imposed by the necessity for social protection."¹ Many exceptions to moral responsibility are now recognized in nearly all codes in the form of limited responsibility or total absence of it on account of alienation, youth, constraint, accident, etc. Thus gradually moral liberty will be replaced by dangerousness to society as a basis for penal responsibility. When, therefore, punishment is adapted to the character of the criminal and the basis of penal responsibility is social these two principles that penal law should be restricted to social interests and that punishment should be determined by social necessity, which have always been theoretically in accord with the positive

¹E. Jarno in *Penal Codes of France, Germany, Belgium and Japan*, edited by S. J. Barrows, Washington, 1901.

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principle of social defense, can at last be applied in practise.

Another principle which like the three preceding was generally adopted after the French Revolution was that of the equality of the citizen before the law. This principle is put into practise almost everywhere to-day. The only exception is when the pardoning power is used. It is evident that to pardon a criminal is to discriminate in his favor against the others who have committed the same crime and is, therefore, a violation of this principle of equality. It is true that pardon is used in certain cases as a makeshift where reform is needed in the code or procedure. For example, political criminals or strikers may be given legislative amnesty after the conditions which demanded their punishment have disappeared. In Germany juveniles are put on probation by means of the pardoning power of the princes. In England it has been used in the place of a criminal court of appeal, the Home Secretary examining the cases which ought to be appealed and granting pardon when there seemed to be a mistake in the decision. This should, however, no longer be necessary since a bill was passed by Parliament in 1907 establishing a criminal court of appeal. In all these cases the pardoning power would no longer need to be used if the appropriate changes were made in the law. As Filangieri has said: "Every pardon accorded to a criminal is a derogation of the law; for, if the pardon is equitable, the law is bad: and if the law is just, the pardon is an infringement upon the law;

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in the first hypothesis it is necessary to abolish the law, and in the second to abolish the pardon.”¹

Another important principle is that of premeditation and intention as a criterion of crime. The significance of premeditation has not always been the same. Among barbarians the effect of premeditation has been to attenuate the crime because it indicated courage. In other words cowardice was punished rather than the crime committed. In a Russian code of the eleventh century murder was punished more severely if committed without drawing the sword from its sheath. In Sweden the ancient laws punished more severely the murder of a man unable to defend himself. In the times of the Crusades feudal Europe punished most severely homicide by order as showing the greatest lack of courage.² But in the Roman law premeditation was regarded as an indication of crime. It was recognized in the Caroline, a code adopted in Germany in 1532, and has been incorporated in all modern penal legislation except the English and its derivatives. Premeditation as a criterion of crime is a recognition of the psychological aspect of crime. Going beyond the objective and material fact that a certain act has been committed it looks into the mind of the person committing it in order to determine whether the act was foreseen. But this is the most elementary factor in the psychological aspect of crime and this principle has been carried further to include the intention with which

¹ *La scienza della legislazione*, Book III, Part IV, Chap. 57.

² G. Tarde: *La philosophie penale*, Paris, 1890.

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a crime is premeditated. On the Continent, therefore, to prove a crime it is usually necessary to prove the existence of premeditation with a criminal intent. This is a tendency towards recognizing crime as a psychic phenomenon but this tendency has not been logically carried out in penal treatment. After the commission of a crime has been determined, punishment is inflicted principally in accordance with the criminal act committed and not according to the criminal character revealed by the act. Furthermore, this tendency has not as yet been carried very far and its application has not always been wise.

A study of various kinds of crimes reveals that premeditation and intention do not furnish a complete or universal criterion for crime. They are but symptoms as the crime itself is a symptom and do not afford a full measure of the character of the criminal. And first with regard to premeditation. Certain crimes of passion are premeditated where the intention is not criminal. "Sometimes, however, there are criminals by passion who also premeditate crime and execute it insidiously, either on account of their less impulsive temperament, or under the influence of prejudices and of common sentiment, in the cases of endemic crime. And this is why, according to criminal psychology, the criterion of premeditation does not possess an absolute value to characterize the born criminal by comparison with the criminal by passion; for it depends upon the individual temperament more than everything else, and is encountered equally in the crimes

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committed by one of the anthropological types of criminals as by the other.”¹ On the other hand absence of premeditation does not necessarily indicate absence of criminal character. “The character of the murderer does not depend upon reflection more or less prolonged. The rapidity of the act has no relation with the corrigible or incorrigible nature of the agent; it is not incompatible with the most complete absence of moral sense.”² Numerous other cases might be cited to show that premeditation is not always a reliable criterion of crime. But we may go farther and show that the intention also is not a universal criterion. In the case of criminal acts committed by the insane, for example, the intention may be to cause injury and yet without any discernment of the anti-social character of the act. “But the intention itself, can it suffice to enable us to affirm the existence of crime? For many insane persons really have the intention of causing damage, of committing incendiarism, even of murder. No, because the crime exists for us only as the revelation of a character, the effect of dishonesty or of cruelty, congenital or acquired, but in every case become *instinctive*, so that one may expect new deeds of the same sort from the same individuals.”³

These examples show the limited extent to which premeditation and intention can serve as a criterion of crime. Such a criterion belongs to those whom

¹ E. Ferri: *La sociologie criminelle*, Paris, 1905, pp. 166-167.

² R. Garofalo: *La criminologie*, Paris, 1905, p. 406.

³ R. Garofalo: *Op. cit.* pp. 307-308.

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Ferri has called the "simplicists of the penal law." These are the jurists who wish to base their criterion of crime upon one or two characteristics alone of the criminal. The preceding chapters have shown how necessary it is to use the data of criminal anthropology as a basis for our criterion of criminality. Especially true is this in the case of the born and insane criminals where the factors which cause criminality are very numerous and complex.

Furthermore this criterion based on premeditation and intention is closely connected with the doctrine of moral responsibility. On the hypothesis of moral liberty it is considered sufficient to know that a criminal act was committed with premeditation and that the intention was evil. When the dangerousness of the criminal to society replaces the doctrine of moral responsibility the nature of the criminal will become the criterion of crime.

The doctrine of the English common law with regard to this matter is characteristic of its empirical origin in the decisions of judges. In general, certain acts are regarded by the law as crimes without any reference to the purpose which inspired them. The criminal intent of these acts is presumed. It is evident that this is a very objective and material view of crime. No consideration whatever is taken of the psychological aspect of a crime. But it is evident that such a rigid and unilateral principle could never have worked out in practise. Its application in many cases would have caused the most apparent injustice. It was

therefore qualified in two ways. In the first place in the case of certain criminal acts it became necessary to prove a purpose, called the specific intent, of an evil and malicious sort. In other words the proof of the commission of the act alone was not sufficient proof of the crime. In the second place it became possible to rebut the presumption of criminal intent under certain conditions. Thus an infant under seven years of age is conclusively presumed by the law to have no criminal intent. Between seven and fourteen there is no presumption of such an intent and its existence would have to be proved. An insane person is conclusively presumed by the law to have no criminal intent. The other grounds for rebutting this presumption are mistake, accident, necessity and compulsion. By means of these qualifications the common law is more or less practical. But it is evident that the underlying theory is very crude and therefore the English criminal law and the systems derived from it in America and elsewhere are not as well prepared in their theory for the incorporation of the new criminological ideas as the Continental systems. This is further proof of the contention made at the beginning of this chapter that Anglo-American criminal law has not been developed in the same philosophic spirit as upon the Continent.

We have already discussed the expedient of extenuating and aggravating circumstances which is a very empirical attempt to place penal treatment on a psychological basis. We have seen how this originated in the conduct of the jury in France.

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The jury refusing to heed the regulation that they were to make their decisions regardless of the penal consequences acquitted in many cases where guilt was certain because they regarded the punishment as too severe. To prevent this the expedient of extenuating circumstances was introduced, the power of granting them being given first to the judge in 1824 and then in 1832 being given to the jury because it did not have sufficient confidence in the judge and continued to acquit too frequently. In a similar fashion was introduced the power of granting aggravating circumstances in which case the penalty was increased. This expedient of extenuating or aggravating circumstances is a slight tendency toward placing the penal treatment as well as the determination of the crime on a psychological basis. But it is an attempt of the most empirical sort and is put into practise with very little knowledge of the psychology of the criminal. Frequently this principle is applied in a way detrimental to social defense as, for example, when extenuating circumstances are granted on the ground that a crime was committed under a more or less irresistible force. If this force was some sudden and unusual passion seizing hold of a normal person it may be logical to grant the extenuating circumstances. But if this force comes from some deep-seated characteristic of the individual which makes him a permanent danger to society, to grant extenuating circumstances is to violate the principle of social defense. The truth is that this expedient of extenuating circumstances is based upon the

doctrine of moral responsibility like the criterion of premeditation and intention we have just been discussing. It is because it is believed that the moral liberty of these individuals has been limited that these extenuating circumstances are granted. Again we must say as we have just said in connection with the criterion of premeditation and intention that moral responsibility as a criterion must be replaced by the dangerousness of the criminal to society. As Garofalo has put it: "Let this consideration (moral responsibility) be replaced by that of the perversity of the criminal, and it will be perceived that several circumstances that are usually called extenuating, become entirely indifferent or require a different treatment."¹

A very important class of crimes is that of the attempted crimes. These are also among the hardest crimes to judge. There are two different doctrines with regard to the attempt. "In Germany and in Italy there exists an objective doctrine of the attempt, which maintains that it is punishable only when the intention has been *realized in part*, so that the attempt is only a fragment of the crime that was to be committed in having, like that, an *objective side*."² In other words the attempt consists fundamentally in an act and this is what makes this an objective doctrine. This is also the doctrine of the common law. A statement as to the nature of the act which constitutes an attempt is usually connected with this doctrine. "In France and in Italy it is required that the criminal intent

¹ *Op. cit.* pp. 360-361.

² R. Garofalo: *Op. cit.* p. 339.

should be manifested by acts capable, *by their own nature*, of producing crime, which prevents the pursuit of criminal attempts, when, by error, the agent has employed means insufficient or incapable of enabling him to attain his object."¹ The same provision is made in the common law. "Thus it has been held that a boy under fourteen cannot intend to commit rape, or a forger intend to defraud a person or corporation which does not exist; while, on the other hand, it has been decided that there may be an attempt to pick a pocket, though the pocket contains nothing, or an attempt to kill, although the intended victim is not within actual reach of the weapon."² Many subtle distinctions have been made as to what acts constitute an attempt which we have not the space to consider here.

The other doctrine of the attempt is the subjective doctrine. According to this the fundamental characteristic of an attempt is the intention to commit a crime. "As the Roman law had established it, in the attempt it is only the intention which has value; the material act has none. From the moment that no damage exists, the will alone can be punished; it matters little therefore that it has used a means which had no probability of success."³ This does not mean that the act has no significance whatever but its significance consists in the fact that it is an expression of the will of the agent.

¹ R. Garofalo: *Op. cit.* p. 339.

² Wm. C. Robinson: *Elementary Law*, Boston, 1882, pp. 303-304.

³ R. Garofalo: *Op. cit.* p. 341.

The theory of the attempt is thus put on a psychological basis. The fact that the means used could not accomplish the crime is of no importance so long as a criminal intent and character is revealed. An exception to this is when the insufficiency of the means used displays utter incapacity to commit crime. "*In such cases there will be no crimes, not on account of the insufficiency of the means, but because this insufficiency is an evident proof of the inaptitude of the agent.*"¹ This exception was recognized in the ancient codes of Hanover, Brunswick, Nassau and Baden which provided that attempts in which insufficient means had been used were not punishable if the choice of means was the result of superstition or imbecility.

These are the two theories of attempted crime. It is evident that from our positive point of view we must adopt the subjective theory as basing itself upon the criminality embodied in the person of the criminal. But how is this theory to be applied in practise? The attempt may be considered as equal in gravity to the accomplished crime or as less than the accomplished crime. It has been the tendency of the subjective theory to adopt the first view and of the objective theory to adopt the second.

It is very evident why the objective theory should regard the attempt as less than the accomplished crime. Inasmuch as the attempt is less in quantity than the accomplished crime it must be considered as less grave according to an objective

¹ R. Garofalo: *Op. cit.* p. 343.

standard. It might be argued that according to this theory the attempt should not be punished at all since as a rule its objective result as a crime is nothing. But this would obviously be very dangerous for society and such rigid logic has been carried out only in the case mentioned above when the means used could not possibly attain the criminal object. This theoretic objection to punishing the attempt according to the objective doctrine was recognized and the practical reason for punishing it somewhat less than the accomplished crime was formulated by Beccaria in the following passage: "Although the laws do not punish the intention, it is not less true that a crime commenced by any act which proves the will to commit it merits a penalty, but less grave than the one which would be inflicted if it had been committed. The importance of preventing an attempt authorizes this punishment; but as there may be an interval between the project and its execution, the fear of a more rigorous penalty may also produce repentance; it may stop the scoundrel ready to become guilty."¹ If it is true that criminals are frequently stopped from consummating a crime by the knowledge that punishment for the attempt is less severe than for the accomplished crime this would be a very good reason for making the penalty for the attempt less severe. But it is probably true that in the case of the majority of crimes there is not a sufficient interval between the beginning and the end of a criminal act to give time for a consideration of this

¹ *Crimes and Punishments*, Chap. XXXVII.

fact. And even if there was sufficient time a criminal is not likely to have sufficient foresight to think of it, if indeed the majority are aware that such a distinction is made. It is therefore doubtful if it is wise to make the punishment for the attempt always less grave for this reason alone.

Another reason for making the penalty for the attempt less severe, which probably deserves more weight, is that there is a feeling among the public that the attempt is not so grave an offense as the accomplished crime. Evidence of this has been shown in France. The French penal code provides that the attempt shall be punished as the accomplished crime itself. But this provision is constantly eluded by the jury by granting extenuating circumstances in the case of an attempt. If the popular feeling is that the attempt should be punished less severely it is necessary to heed it however mistaken it may be from a scientific point of view, because otherwise a feeling of distrust of justice may be developed. It is dangerous in matters of justice to advance far beyond the thought and feeling of the public.

The French law does not punish preparatory acts as an attempt though they may be punished as separate misdemeanors. The reason for this is not to attach penal responsibility too early in order to give the criminal a reason for desisting from his enterprise. But when the attempt has been made it is assimilated with the crime itself and punished like it, though, as we have seen, the jury

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constantly eludes this by granting extenuating circumstances.

A distinction is sometimes made between the attempted crime and the abortive or miscarried crime (*délit manqué, avorté*), in other words where the criminal has done all in his power but has failed through circumstances which he could not control. It is evident that in this case in accordance with the positive theory there is even more reason to assimilate the abortive with the accomplished crime than in the case of the attempt because the criminal has done all in his power to commit the crime and has fully manifested his criminal character, whereas in the case of the simple attempt the criminal may have desisted of his own accord thus manifesting less criminality.

A study of the various classes of crimes which are not fully consummated and still more so of individual cases in these classes shows that it is impossible to have a single and unilateral rule for them all. As in the case of all these fundamental principles of penal law all the factors in each case must be taken into consideration and the decision must depend upon the criminality of the agent or his dangerousness to society. Ferri has indicated the complexity of the problem in the following words: "But furthermore it must never be forgotten that the attempt must no longer be judged by itself or in its abstract relations to the juridical order, as the classical school does it, but that it must always be considered as a criterion which is joined to that of the determining motives and to

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that of the anthropological category of the delinquent.”¹ The important thing therefore is to improve our means of ascertaining the determining motives of criminals and their anthropological characteristics and that is the aim of the present study of criminal procedure.

A question of penal law closely connected with that of the attempt is complicity. In the common law a distinction is made between the principal who committed the criminal act and the accessory who assisted in the case of felonies. In cases of treason and misdemeanors all concerned are principals, no distinction being made. Most of the Continental systems make a distinction between the principal and the accessory or accomplice and when this distinction is made the accomplice is as a rule punished less severely than the principal. The classical reason for making this distinction was formulated by Beccaria as follows: “When several men unite themselves to face a common peril, the greater this peril the more they will endeavor to make it equal for all; the more difficult therefore it will become for them to find one among them who is willing to arm himself to consummate the crime, when this one will find himself running a danger more imminent and more terrible; this rule would suffer exception only in the case where some recompense proposed to the executor of the crime would have balanced the difference of the crime to which he was exposing himself and then the

¹ *Op. cit.* p. 478.

penalty would have to be equal.”¹ The inequality in the risk run would tend to cause lack of harmony among the conspirators and thus lessen their effectiveness as criminals. This theory of complicity is similar to the objective theory of the attempt. An accomplice is considered less guilty than the principal because he has done less, without any regard to what his intentions were. The principal exception to this theory is that of the French penal code which with the exception of a few cases inflicts the same penalty on the accomplice as on the principal. In practise, however, as in the case of the attempt the accomplice is usually given a lighter punishment by means of the expedient of extenuating circumstances. The theory of this code may be called the subjective theory since the accomplice is considered as guilty as the principal because his intentions were just as criminal. It has not the practical advantage of the other theory suggested by Beccaria but on the other hand the severity of the punishment for complicity tends to discourage persons from becoming accomplices.

But both of these theories are unsatisfactory. The first theory bases itself entirely on the material circumstances of the crime and ignores the character of the criminal. The second theory is subjective but is too rigid and does not give any weight to the personal circumstances in each case. The accomplice may be as guilty in his intentions as the principal, but is not so necessarily. He is also not necessarily as criminal in nature as the

¹ *Crimes and Punishments*, Chap. XXXVII.

principal and therefore ought to be punished less severely. "Why should the same treatment be due to the professional thief and to the novice enticed by him?"¹ We have not space here to discuss the different kinds of complicity. As in the case of the attempt a much more flexible theory is needed than is at the base of any penal code. The personal circumstances of each individual case must be studied before the criminality of the accomplice can be determined. The fact of complicity also has significance in determining the character of the principal. "Since the least formidable delinquents (occasional and by passion) have as a constant psychological characteristic (except in the case of a crowd which commits a crime in a transport of passion) to act alone and without accomplices, while the reverse is observed among the most dangerous delinquents (born and habitual), complicity must therefore constitute in itself alone an aggravating circumstance, to speak like the classical theories."²

Another important question dealt with by the penal law is that of the plurality of crimes. Two principal kinds of plurality of crimes exist. The simplest form is the accumulation of offenses before a condemnation has taken place and is usually called reiteration. The second is a repetition of crime after a condemnation, usually called recidivation. The tendency of modern penal legislation has been in the first case to punish only one of the

¹ R. Garofalo: *Op. cit.* p. 353.

² E. Ferri: *Op. cit.* pp. 478-479.

offenses, usually the gravest one. In the second case recidivation is usually punished more severely than the first offense. The reason for thus distinguishing against recidivation is that a previous condemnation has served as a warning and therefore the offense is greater than in the case of reiteration where there has been no warning. But in this case, as we have seen several times before, the theory is too narrow and simple and the practise based upon it too inflexible. It is true that recidivation is usually a strong indication of criminal character, but a person guilty of several offenses who has never been condemned before may be as criminal as a recidivist and many such offenders are so. It is, therefore, necessary to determine the criminality according to the circumstances of each case and adjust the penalty accordingly. Furthermore, it is not merely a question of aggravating or diminishing the quantity of punishment but also a question of its quality. In the case of recidivation the reason why the first penalty has failed is not merely because the criminal has not heeded it but because it was not the right kind of penalty. It is, therefore, not so much a question of aggravating the punishment but of changing its character. "For the new offense is the best proof that the first means that has been used has not attained its object. I comprehend up to a certain point a second experiment, in increasing in a very sensible manner the quantity of the remedy, but what would one say of a doctor, who, after the second failure, persisted in the same method, when

he has not yet experimented with the other therapeutic means counselled in this case by science?"¹

It is a rule of modern penal law that augmentation of punishment after an appeal is not possible. This rule has been attacked on the ground that it violates the equilibrium between individual and social rights in procedure.² If a condemned person enjoys the possibility of gaining a diminution of punishment or an acquittal after an appeal, he should also be forced to take the risk of receiving a severer penalty. In theory this is quite right. There is also a practical reason for this. If such a risk for the appellant existed the number of appeals based on no reasonable grounds would greatly diminish, thus increasing the effectiveness of punishment by making it more prompt and sure.³ Historically, however, the reason for this rule has been to protect the individual from being intimidated from appealing on account of the danger of receiving a much severer penalty as punishment for having appealed. Until a very high grade of justice is administered in the courts such a protection is needed for the individual. Furthermore the tendency towards the individualization of punishment and the indetermination of its amount lessens the practical importance of this change since appeals will be more for the sake of acquittal or of a change in the kind of punishment than for a change in the quantity.

¹ R. Garofalo: *Op. cit.* pp. 357-358.

² E. Ferri: *Op. cit.* pp. 496-497.

³ Cf. C. Lombroso: *Le crime, causes et remèdes*, Paris, 1907, p. 433.

Another change which is much less defensible than the last is that of the revision of acquittals. It is contended that if a decision unfavorable to an accused can be revised it should be possible to revise also a decision which is favorable to him.¹ According to the theory of the equilibrium between individual and social rights this change would be logical. Furthermore, it is true that in some cases incriminating evidence comes to light after an acquittal, or an acquittal is the result of false testimony or a mistake in the process. But in order to correct these errors it would be necessary to put all those who have ever been acquitted in constant danger of a new trial. An acquittal would not be the declaration of innocence it is to-day and it would be much more difficult for the person acquitted to regain his position in society. It is, therefore, probable that the social loss from this change would be greater than the social gain. Instead of making this change it should be possible to use any further evidence of guilt which arises after acquittal against the acquitted person in case he ever again appears in a court on a new charge. This would have most if not all of the advantages of the proposed change with none of its disadvantages.

Another rule of penal law which has been attacked is that of the perscription of penal action after a certain length of time. "A skillful swindler changes his name, he goes to another city to continue his exploits; discovered at last, if five years

¹ Cf. E. Ferri; *Op. cit.* p. 497.

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have passed since his first offenses, it will be possible to prosecute him only for the others! If, for these last, there is a lack of proof, he is restored by the law to his noble industry."¹ This case is much like that of the revision of acquittals. Occasionally the prescription of penal action prevents the law from catching a professional thief. But on the other hand it would be a great detriment to many persons to be in danger throughout life of prosecution for a criminal act committed many years before. People change with time and to punish a person for an act committed many years before is not to punish the same person who committed the crime.

We have now reviewed most of the fundamental principles of modern penal law. We have found that most of them are too rigid in character. They treat a large number of cases in the same way, notwithstanding great variations in the character of the cases. This characteristic of penal law has been traced to ideo-emotional arrest or the tendency of the mind to reduce to a minimum the number of mental associations necessary for a piece of work. "Thus the absolutism of the deductive method in juridical science is a sign of decrepitude, and the law of ideo-emotional arrest explains to us why, so often, the law of barbarous or very uncivilized peoples is distinguished by a certain realism full of good sense, in comparison to the logical subtleties wonderful, but absurd, of the law of most of

¹ R. Garofalo: *Op. cit.* p. 398.

the civilized peoples."¹ The judge is thus provided by means of deductive logic with a legal criterion to be applied in each case. But what is needed is a personal criterion for each case. The law must permit of the individualization of treatment. To do this each principle must be so flexible as to be applicable in accordance with the personal factors in each case.

What then must be done to bring about this change? In the first place, as we have several times contended, moral responsibility should be abolished as a fundamental criterion of criminality and should be replaced by the dangerousness of the criminal to society. The responsibility and intention of the criminal will then become indications of his character. But so long as the hypothesis of moral liberty remains at the base of penal law it will be deductive in character. With the dangerousness of the criminal as a criterion the general principles of penal law can be developed. These principles will be based upon the sciences which throw light upon the character of the criminal and upon the data and statistics concerning crime and the criminal. They will, however, necessarily be very general in their character so as to permit of individualization. This will result in limiting the practical scope of penal law. On the other hand, as we have already indicated, the scope of procedure will be increased because the application of the law in each case will be determined by procedure.

¹ G. Ferrero: *Les lois psychologiques du symbolisme*, Paris, 1894.

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It may seem as if this change would make the penal law unstable and uncertain, but this is not necessarily so. It would be as certain as before and its authority would be as unquestionable as ever. But the tendency would be for the number of laws to greatly diminish inasmuch as the fundamental principles would be very general, the details being left to procedure. This would result in a simplification of the law which is one of the great preventives of crime. "Do you want to prevent crimes? Make the laws clear, simple and of such a nature that all the society that they govern will unite its forces to defend them, so that one will not see one part of the nation occupied in sapping them down to their foundations."¹ With the laws thus simplified the axiom that ignorance of the law is no excuse would become a practical working principle which it is not now. Furthermore, many frauds would be prevented on innocent people who cannot know the law as it now exists.² The knowledge of the law is spread among the public by its codification so that it can be easily read by all.

Before ending this chapter we must discuss the penal code and its relation to procedure. In the majority of existing penal codes crimes are classified according to the punishment inflicted. In the common law, with the exception of treason which stood in a class by itself, crimes were divided into felonies and misdemeanors. Felonies were those crimes which resulted in the forfeiture of

¹ C. Becarria: *Crimes and Punishments*, Chap. XLI.

² Cf. E. Ferri: *Op. cit.* p. 296.

the criminal's estate. Misdemeanors were the crimes punished less severely. These terms are still used in Anglo-American penal codes and they are still based on distinctions of punishment though not on the same ones as in the common law, as, for example, in the New York penal code in which felonies are those crimes whose maximum penalty is more than one year's imprisonment and five hundred dollars' fine.

In the French penal code offenses are divided into three classes; crimes, misdemeanors, and trespasses (*crimes, délits, et contraventions*) according to the penalty prescribed by the law.¹ Crimes (*crimes*), which are the most serious offenses, are punishable by death, penal servitude, transportation, military imprisonment, solitary confinement, banishment or civil degradation. Misdemeanors (*délits*), which are less serious, are punishable by imprisonment for over five days, fine of over fifteen francs, or deprivation of the exercise of certain civil and family rights. Trespasses (*contraventions*), the least serious offenses, are punishable by imprisonment from one to five days or by a fine of from one to fifteen francs. This classification has been adopted by the majority of the Continental codes, as for example, by the German code of 1870 and was retained in the Belgian code of 1867.

It is evident that such classifications of offenses are very objective in their character. The penalties

¹ Cf. E. Jarno in *The Penal Codes of France, Germany, Belgium and Japan*, edited by Samuel J. Barrows, Washington, 1901, pp. 15-17.

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are adjusted according to the gravity of the crimes from the social standpoint. It is true that the gravity of the crimes do correspond to a certain extent to the criminality of the criminals. But this is not always the case. Furthermore, a very slight difference in an offense will change it from one class to another thus causing a very great change in its punishment. There has, therefore, been a feeling that offenses should be classified more according to the characteristics which reveal the character of the criminal. This feeling has had some influence on recent legislation. It has resulted in a bipartite classification of offenses which was adopted by the Dutch code of 1881 and the Italian code of 1889. According to this classification, offenses are divided into misdemeanors and trespasses (*délits et contraventions*). Misdemeanors are offenses of every degree of gravity which are intentional and intrinsically immoral. Trespasses are unintentional offenses. In 1894 the *Martineau* Bill was introduced into the French Chamber of Deputies, the intention of which was to classify offenses according to the state of mind of the criminals when committing them. According to this bill the penal code would describe the actions which are criminal without attaching any penalties to them. There were to be eight degrees of guilt with a penalty attached to each. The jury was to specify the degree of guilt and the judge was to apply the corresponding penalty.

The bipartite classification and the *Martineau* Bill tend in the right direction but neither of them

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provide for a thorough-going individualization of punishment. What sort of a penal code then would make such individualization possible? In the first place it is evident that the code must specify what actions are criminal in order to fix penal responsibility. But to do this it is not necessary, when the right violated is the same, that fine distinctions should be drawn between criminal acts on the basis of differences in the manner of performing them. The reason for these fine distinctions is that to-day punishment is determined by the manner of violating a right. But when punishment will be determined by the nature of the criminal the only question of importance will be whether a right has been violated and not the exact manner in which it was violated. The penal code would thus become much more subjective in its character. Its only object would be to designate those who are criminals by specifying certain classes of acts which as violations of certain rights are criminal. But the penalties would be determined according to these acts only to the extent that they reveal the character of the criminals. The judges and the penal administration would determine the penalties as has been indicated in the chapter on the individualization of punishment. The only cases where it would be necessary to indicate in great detail the manner of performing a crime would be when an act is on the border line between the violation and the non-violation of a right in order that no question can be raised about its criminality or non-criminality. Such certainty is all-important in a penal code.

Such a penal code would be a much more effective weapon of social defense against crime than existing codes. When the penalty for a crime is fixed beforehand, the criminal is able to calculate the risk and to determine whether it is worth while to commit a certain crime just as a business man determines whether it is worth while to undertake a certain venture. Von Liszt has summed up the case for the penal code of to-day as follows: "So paradoxical as it may be, a penal code is the *Magna Charta* of the criminal. It protects neither the legal order nor society, but above all the individual who puts himself in revolt against them. It assures the right to be punished only within legal conditions and limits." It is curious to note how this very idea that a person should be able to calculate the results of his evil act has prevailed in the past. For example, Beccaria has put it as follows: "With penal laws literally executed, the citizen will live tranquilly under the protection of public security; he will enjoy the fruit of the union of men in society, which is right; he will be able to calculate precisely the inconveniences of a bad act, which is useful."¹ But this shows an inadequate conception of social defense which cannot be effectively practised if punishment cannot be determined by the character of the criminal. This does not necessitate a violation of the individual rights of criminals. On the contrary, with a code such as we have described, the occasional criminals would endure much less punishment than under a code of

¹ C. Beccaria: *Op. Cit.* Chap. IV.

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fixed penalties. Thus crime would no longer be regarded as a juridical abstraction but as human action, as a natural and social phenomenon and would be treated as such.

We now see the significance of the data and inductions of criminal anthropology and sociology for the fundamental principles of criminal law. It is essential that these principles of law should be studied in the light of these two sciences in order that criminal law shall furnish a satisfactory theoretic basis for the practical treatment of the criminal in procedure and in the penal system in accordance with the principles of these sciences.

CHAPTER VI

h

THE SYSTEMS OF CRIMINAL PROCEDURE

We now come to the study of the principal systems of criminal procedure. The introduction to this study has been rather long but it was necessary to review the great forces, scientific and social, which are changing the methods of procedure to-day and which will change them still more in the future. The remainder of this work will be devoted to a consideration of what these changes are and, as far as possible, of what they will be.

The functions of criminal procedure are two, the one positive, the other negative. Its positive function is to apprehend every criminal, its negative function is to prevent the prosecution or condemnation of any innocent person. The ideal procedure, therefore, would be too firm to permit the escape of a single criminal and yet sufficiently flexible to prevent the prosecution and especially the condemnation of any innocent person. But to devise such a procedure is not possible. Strictly speaking, nothing can be proved absolutely, while in many cases the evidence can not make a decision more than probable. Furthermore, the situation is greatly complicated by the opposition of social and

individual interests in procedure. It is always difficult to preserve the balance between the rights of the individual and of society, but perhaps nowhere more so than in criminal procedure. Social defense requires strict measures of investigation and prosecution which may sometimes result in the prosecution of an innocent person. On the other hand, individual liberty must be defended and conserved. The condemnation of an innocent person when discovered is a great shock to public sentiment not only as a violation of justice but also because each imagines himself or herself in the place of the victim and realizes in what jeopardy everyone is placed when such judicial errors are possible. Therefore, whereas we cannot hope to devise a perfect system, we must develop one in which the possibility of error will be reduced to a minimum.

The first task of procedure is to prove that a crime has been committed. To do this the commission of a certain act or the existence of a certain state of facts must be proved. In the second place the imputability of this crime to a certain person must be proved. This requires proof not only of physical imputability but also that the person to whom the crime is imputed was not coerced from without when he committed it so that it may be regarded as an expression of his character. These two things are usually proved at the same time, but it is evident that the second cannot be proved if the first is not proved. When someone has been found guilty the third task of procedure

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is to determine what treatment is to be given to the criminal.

The principal types of procedure are the procedure of accusation and the procedure of investigation. Upon these two types of procedure are based existing systems of procedure. We shall now study these procedures from a positive point of view in order to determine the positive value of each system.

The procedure of accusation is in all probability the older of the two forms of procedure. This form developed out of private vengeance inflicted by one individual upon another for a wrong suffered. Such acts of vengeance created a state of private war between individuals. It is not possible here to relate in detail the evolution from this state to a form of legal procedure. Suffice it to say that the legal duel was established in which individuals fought out their grievances according to certain rules. "The duel is the primitive form of penal law; the idea of sanction and of reprobation was as completely foreign to this original form of penal law as it still is among us in duelling matters, whatever may be the unworthiness of the aggressor or the criminality, if not legal, at least social, of the deed which was the cause of the combat."¹ But as social and political conditions grew more stable it became very detrimental to have this private war constantly going on. Consequently the procedure of accusation was developed to satisfy private

¹ R. Saleilles: *L'individualisation de la peine*, Paris, 1898, p. 23.

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grievances by peaceful legal means. But long after the great mass of the people was required to settle its grievances by means of this procedure, the upper classes retained the privilege of the duel as among the feudal lords who settled their difficulties by means of private war and almost down to our day the duel has not been considered illegal in certain cases.

We have not space here to consider all the forces which acted upon the development of the procedure of accusation. This form of procedure has not necessarily existed at any one time in a complete and pure state. But it is probable that all systems of procedure were originally accusatory and some of the existing systems are still based upon it.

The fundamental theory of the procedure of accusation is that the trial is a combat between two individuals like its predecessor, the duel. It is only a legal means of securing vengeance. This is indicated by the early forms of punishment, such as composition, *wergeld*, etc. It is not until later that punishment is inflicted for the injury done to society. The only interest of society at first is that the dispute shall be decided and reparation gained by peaceful means. Therefore, the king or a judge as a representative of society acts as an arbiter between the opposing parties. It is evident that the accusation must be made by a private person, the injured party or "those of his lineage." The judge cannot start a process himself. It is a principle of this form of procedure that there can be no process without an accuser. The examination into

the facts of a case, as developed by this form of procedure, is public, oral and contradictory in order to give each party an equal opportunity to state its case.

This is the procedure of accusation in its original, pure form. But as the social importance of penal procedure increased, the procedure of accusation began to vary from its original form which was designed for the decision of private disputes. When crimes came to be regarded as injurious to society, as well as to the individuals against whom they were committed, it became essential that all criminals should be prosecuted. But there was danger of impunity to many criminals under the procedure of accusation on account of apathy on the part of the accusers. In order to start a process against a criminal, it was necessary that the injured party should make an accusation. If this accusation was not made, the criminal went unpunished. To remedy this the popular accusation was developed according to which any person can bring an accusation for crime committed, even if he is not the injured party. Laws have also been passed prohibiting the compounding of crime which is a transaction for the suppression of criminal pursuit and the stopping of a process already commenced, except with the consent of the court. But even these measures have not proved sufficient and as we shall see later existing systems based upon the procedure of accusation have been forced to adopt public prosecution which is characteristic of the procedure of investigation.

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Another danger of the procedure of accusation is that it will be used for evil purposes. It may be used for the extortion of blackmail, or for the satisfaction of personal hatred where no grievance exists, or for the satisfaction of fancied grievances. Measures have been taken against this danger such as the severe punishment of blackmail, the possibility of bringing a civil suit for damages in case of prosecution upon no reasonable basis of facts. But even with these measures some sort of supervision over the prosecution is needed and has been introduced into most systems.

The examination in the procedure of accusation has certain faults. Its publicity frequently enables the accused to destroy incriminating evidence. The power of the accused not to testify if he so chooses deprives the court of one valuable source of information. This silence of the accused usually deprives society of a powerful weapon against crime, though sometimes it does injury to the accused himself, especially when he is innocent.

The procedure of accusation is on the whole the best fitted for reaching a decision, though the value of this characteristic may in some respects be questioned from the positive point of view. The principal object of the procedure of accusation as it exists to-day is to safeguard individual liberty and in theory it offers the maximum of guarantees to the accused, though it does not always do so in practise. But we will not discuss further these and the other characteristics of this form of procedure until we have described the procedure of

investigation, after which in the course of a study of the existing systems we can estimate the positive value of these two forms of procedure.

The procedure of investigation or inquisitorial procedure seems to have originated in the Roman law into which it was introduced during the latter part of its history. However, the question of its origin is of little importance in this connection. What is of great practical importance is that it was adopted by the Catholic Church and developed in the canonical law. In the Middle Ages the Church had a great deal of power and many crimes were prosecuted in the ecclesiastical courts. Sometimes crimes were prosecuted by the bishops who acted as judges when no complaint had been brought before them. This increased greatly the power of the Church, so that in course of time it became the regular procedure. Under the Inquisition it was very useful for prosecuting heretics and forcing confessions from them. After receiving this great extension in the ecclesiastical courts it began to be adopted by the secular law. In France, it was introduced into the penal system by means of royal ordinances such as those of 1498, 1539 and a famous one on criminal procedure in 1670.¹ In the *Constitutio Criminalis Carolina*, a criminal code adopted in Germany under Charles V, in 1532, it was recognized as the usual procedure.² Thus it

¹ A. Le Poittevin: in *The Penal Codes of France, Germany, Belgium, and Japan*, edited by S. J. Barrows, Washington, 1901, p. 44.

² W. Mittermaier: in *The Penal Codes of France, Germany, Belgium and Japan*, edited by S. J. Barrows, Washington, 1901, p. 105.

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replaced the procedure of accusation on the Continent and remained in practise until the French Revolution, when it underwent great changes.

The procedure of investigation, like that of accusation, may never have existed in its pure form, but we can easily distinguish its principal features as a type. The fundamental theory of this form of procedure is that the pursuit and punishment of criminals is of great interest to society. Consequently, society has the right to commence a criminal process. This it may do, not necessarily by accusing some one of crime, but by making an investigation to determine whether a crime has been committed or whether a certain person has committed a crime. Therefore the judge, acting not as an arbiter between two parties, but as the representative of society, commences such an investigation, and if he finds incriminating evidence he prosecutes the suspected person. His decision need not be based only on the evidence brought before him by the accuser, if there be one, and by the prisoner, but he may collect evidence himself. Theoretically, his position is as impartial as in the procedure of accusation. But as frequently there is no accuser, and as he has to conduct the prosecution the tendency is for the judge in the procedure of investigation to become biased against the prisoner. The examination is considerably different from the procedure of accusation. It is secret, written and uncontradictory. The process is no longer one between two personal adversaries. It is the trial of the prisoner before a judge who

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is impartial but who represents society, which is the great opponent of the prisoner if it is proved that he is guilty. The process is not contradictory because no opposing parties appear in the course of it. It is secret because it is in theory only an inquiry conducted by the representative of society and this inquiry can be all the more searching if made in secret. It is written also because it is an inquiry, the only object being to gather as much evidence as possible and to have it on record as a basis for judgment.

It is evident that the procedure of investigation is a great power in the hands of the central government. The government is, of course, expected to use this power in the service of justice. But the danger always exists of its being used as a political weapon. Furthermore, it is dangerous to put the power of prosecution and that of judgment in the same hands. Strictly speaking, there is no such thing as prosecution in the procedure of investigation, the process being only an inquiry into the facts. But inasmuch as social interests are at stake and society is, in a sense, the opponent of the prisoner, the judge, as the representative of society, becomes a prosecutor. This tends to bias him against the prisoner and thus unfits him for judging.

The examination in the procedure of investigation has certain faults. The powers of the judge in accepting and rejecting evidence are very arbitrary. If he begins his examination with a prejudice in favor of one side, he is likely to find the evidence

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in favor of that side and to ignore the other. In fact, judicial functions are hardly compatible with an active investigation. In order that all the evidence in favor of a side be brought to light it should be gathered and presented by some one interested in that side. It is hardly possible for one person to present all the evidence on both sides. And while gathering the evidence he is likely to become biased in favor of one or the other side. In order to arrive at the best possible decision, the judge should come with a fresh and unbiased mind to a consideration of the evidence after it has been carefully prepared by others, and should remain in a passive state while it is being presented to him.

The secrecy and lack of contradiction tend to limit the power of the prisoner to defend himself. His inability to contradict prevents him from explaining and replying directly to evidence offered against him while its impression upon the mind of the judge is still fresh. Still more is he hampered by the secrecy of the examination, which frequently prevents him from knowing what evidence has been found, so as to reply to it when he is given the opportunity to testify.

The principal object of the procedure of investigation is to defend the interests of society. This is quite in accordance with our theory of social defense. But in practise it tends to discriminate against the prisoner and thus violates the rights of the individual. We shall now study the existing systems of procedure in whose history and present

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forms we shall see how these two types of procedure have modified each other and shall be better able to judge them from the positive point of view.

The principal example of the procedure of accusation is the English system of procedure, though it has varied greatly from the original form of procedure. In theory, at least, the prosecution is private but it is now done in the name of the king, which is a recognition of the interests of society in the prosecution and, as we shall see, in practise there is a great deal of public prosecution. The trial is conducted by the two opposing parties and is public, oral and contradictory. The judge acts only as an arbiter, intervening only when questions arise as to how the process is to be carried on. Out of the decisions of judges regarding evidence has grown the English law of evidence, which is the most complete body of rules with regard to evidence in any system of law. The decision regarding guilt is made by a jury, which is an institution developed by the procedure of accusation. Its underlying theory is that a man is to be judged by his peers and it is a safeguard against the judges who, as representatives of the government, may prosecute and condemn in the interests of society.

The leading example of the procedure of investigation is the French procedure which, since the French Revolution, has more or less influenced every Continental system of procedure. In France the prosecuting is done by a body of public officials called the *ministère publique*. The accused is examined by a magistrate called the *juge d'instruction*.

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This examination is almost entirely secret, only the counsel for the prisoner being present. It is absolutely uncontradictory and a written record is made. The functions of the *juge d'instruction* are a survival of the Inquisition and his position is much like that of the Grand Inquisitor. The record of this examination in the form of depositions of witnesses is sent to the judge who is to preside at the trial who reads them over. This frequently tends to develop a hostile attitude on his part against the prisoner. The presentation of evidence in the trial is oral and public. But it is almost entirely uncontradictory since the questioning of witnesses is done by the judge and there is no cross examination. The rules of evidence are very few and elementary, so that the judge is quite independent in the examination of witnesses. The principal contradictory feature in the trial is furnished by the speeches of the *procureur de la République* or public prosecutor and the counsel for the defense, after the examination of witnesses. After the French Revolution the jury was introduced into the procedure and was a modification tending towards the procedure of accusation.

In the succeeding chapters each of the different stages of procedure will be taken up and studied in detail, and a comparative study will be made of the methods used in different systems of procedure. In the present chapter only a brief description of the two principal forms of procedure is being given and a study of their value as a whole is being made from the positive point of view.

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The procedure of accusation is based on the primitive theory of personal vengeance. The underlying theory of the procedure of investigation is much more advanced, showing a higher conception of the function of penal procedure. It is evident that it is much more in harmony with our positive theory of the social defense. But in practise it has tended in certain respects to violate individual rights and therefore needs modification. As we have seen in the chapter on society and the criminal such violation of individual rights is incompatible with social interests as well, since these interests require that only those acts should be repressed and punished which are injurious to society as a whole and any further repression is a disturbing factor in social life. To correct this fault in the practise of the procedure of investigation it is necessary to look to the procedure of accusation which offers a greater guarantee of protection to individual rights. To devise the best possible procedure, therefore, we must adopt the theoretic basis of the procedure of investigation and those features of both forms of procedure which will put this theory into practise. This has been the very tendency in existing systems of procedure. The primitive theory of vengeance as a basis for penal treatment has been dying out and is being replaced by that of social defense, while the systems based on the two forms of procedure have been approaching each other in practise.

The procedure of accusation leaves the prosecution of criminals to the injured parties. But this

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results in impunity for many criminals. Indifference, threats, money and other reasons keep people from accusing and prosecuting. A first step towards remedying this was the popular accusation by means of which every citizen could accuse any other of a crime. Montesquieu has said that the popular accusation is suited to republics where patriotism is very strong, but not to monarchies where this sentiment is weak.¹ But even in republics patriotism could hardly be sufficiently strong to induce citizens to take the time and trouble to accuse and to take the risk of making a false accusation. Therefore a public agency for the pursuit and prosecution of criminals is absolutely necessary. We see in the English procedure in which the prosecution is private in theory how much of it is public in practise. The police has become the great prosecuting agency in England. It is evident that if the police should wait until a private citizen brings a charge in each case, most criminals would go unpunished. Therefore the police prosecute in theory as private citizens, but in reality as public officials. The "Criminal Investigation Department" is composed of experienced officers, who devote themselves to the pursuit of crime and are assisted in prosecuting by special advocates. The most important cases they take to the "Director of Public Prosecutions" to prosecute. This official also prosecutes in some cases of his own accord. The State departments prosecute cases which interest them, while certain philanthropic organizations

¹ C. Beccaria: *Crimes and Punishments*, Chap. XV.

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prosecute certain kinds of crime in a semi-public capacity. The county also pays for the prosecution of cases when other means of prosecution fail. Thus the only cases left for private prosecution are those of a more obscure sort and those committed against the railroads and other large corporations, which are quite capable of prosecuting them.

In the procedure of investigation there is no prosecution, strictly speaking. The judge is simply conducting an inquiry. But in practise it is his tendency, because he is the representative of social interests, to regard the prisoner as guilty and therefore to prosecute. To remedy this official or public prosecution was introduced into this form of procedure. Public prosecution is a combination of the two forms of procedure. It is prosecution by a person other than the judge as in the procedure of accusation, but it is prosecution by a representative of society in its interests and therefore harmonizes with the theory of the procedure of investigation. Public prosecution brought with it the contradictory element, for it necessitated defense for the criminal. Thus we see how in the matter of prosecution the tendency has been towards the theory of the procedure of investigation modified, however, in practise by the procedure of accusation.

The preliminary examination, as developed by the two forms of procedure, varies somewhat. In the French procedure it is made by the *juge d'instruction*. Until recently it was absolutely secret and uncontradictory, but in 1897 the counsel for

the defense was given the right to be present. But he has no part in the examination and as no prosecutor is present it is entirely uncontradictory. In the English and American procedure the preliminary examination is made by the police magistrate. It is public and may be contradictory if representatives of the prosecution and defense are present. This gives to it the character of a trial rather than that of an examination. This is unnecessary, since it is not the object of the preliminary examination to reach a final decision, but only to determine whether there is sufficient evidence to indicate that a crime has been committed and create a possibility that the prisoner committed it. The work of the grand jury, which in more serious cases supplements the work of the examining magistrate, is conducted more like an examination, since no contradictory element is introduced into it. The Continental method certainly seems better fitted for the purposes of an examination. In the quiet of the *cabinet d'instruction*, undisturbed by a contradictory debate, the *juge d'instruction* can learn enough about a case to determine whether it ought to be sent to trial or dismissed, though not enough for a final decision. The contradictory debate in the preliminary examination cannot furnish a satisfactory basis for a decision, because of the shortness of the time which makes careful preparation and a presentation of all the evidence impossible.

But when we come to the trial a final decision is wanted. It may be safely laid down as a rule that the judge should have nothing to do with the

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gathering or presentation of evidence. This should be done by others and put before him in the manner best calculated to show its value. For this reason, the Continental method in which the judge questions the witnesses, thus conducting the presentation of evidence for both sides, is very objectionable. It is a psychic impossibility for a man to keep in mind all the important considerations on both sides and bring out all the significant points in the evidence. To accomplish this the examination of witnesses should be conducted by representatives of both sides, each having in mind the important points on his own side and bringing them out in the testimony. Each would also be watching for contradictions and discrepancies in the evidence offered by the other side and would expose them in a way which would be impossible for the judge, who would be endeavoring to keep in mind at the same time the important points on both sides. If it were possible for a single man to do this, the procedure of investigation would be the best one for a trial. But since it is a psychic impossibility the system of examination and cross-examination and of the contradictory debate as developed by the procedure of accusation is the best. This opinion has been expressed by a distinguished French legal writer in the following words: "The inquisitorial form is very appropriate for researches, verifications, the proof of facts. The examination, founded upon a profound observation of witnesses, of accused persons and of facts concerned, is a philosophic task which can be accomplished by a

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single man, and which requires of this man a double condition; the experience of things and the science of the law. But carry this inquisitorial system beyond the preparatory examination, try to apply it to the final examination and its power weakens at once—for the judgment is the work of conviction, and not of science, and a method, however scientific it may be, can conduct to the formation of a judgment but does not form it. The conviction, this intimate feeling of truth, can be born only in the debates. Its elements are the interrogatory and the defense of the accused, the hearing and the discussion of testimony, the examination of all the facts, the weighing of all the proofs. It is necessary that the judge, magistrate or juror, should be present at the contradictory debate of these facts and of these declarations; that, placed in the midst of the opposing allegations of the accusation and of the defense, which collide without cessation, he should examine, weigh, and determine his opinion. The proofs the most palpable have value only when they have been submitted to this test; it is in the combat aroused that the truth manifests itself”¹

We therefore adopt the system developed by the procedure of accusation for reaching a decision while retaining the theory of the procedure of investigation. But there is danger that with the system will be retained the theory of the procedure of accusation. This system is derived from the duel and in form is much like a duel, though the

¹ Faustin Hélie: *Traité de l'instruction criminelle*.

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weapons now used are words and arguments. It is necessary to indicate very clearly that this system is being used because it is the best one by which to present the evidence and to represent social and individual rights, both of which must be taken into consideration. But it is necessary to emphasize that there is no fundamental antagonism between these two kinds of rights. In the following chapters on the different stages of procedure changes will be discussed by which all suggestion of this antagonism will be eliminated from procedure.

CHAPTER VII

THE POLICE AGENCY

It may be contended that the functions performed by the police agency do not belong to procedure, on the ground that procedure does not begin until a process is begun by an official of the judicial system such as a judge or prosecuting attorney. It is true that one of the police functions is not a part of procedure. This is the enforcement of those administrative measures whose object it is to prevent crime by maintaining orderly conditions. The distinction between this preventive and the repressive function of the police is recognized in some countries, as, for example, in France, by organizing two bodies of police, the first being the administrative police for performing the preventive function, the other being the judicial police for performing the repressive function. This last function belongs to procedure because it performs the first step in separating criminals from the rest of society.

The first step in performing this repressive function is to apprehend the criminal. The second is to gather evidence. This last has not been developed very much as yet but we shall see in this

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chapter what great possibilities it offers. The development of this function would bring the police agency into much closer touch with the other parts of procedure and would make it an integral part of procedure.

A criminal or a person suspected of crime is apprehended by means of arrest. According to the common law the power of arrest could be exercised by any person when a crime was being committed in his presence, or, when a felony had been committed, over the person whom he had reason to believe was the felon. Also when a hue and cry or general alarm was raised for the pursuit and capture of a felon or of one who had committed a dangerous assault, every one who was called upon to assist in this arrest under hue and cry was bound to do so. But the power of arrest is now exercised almost entirely if not entirely in Anglo-Saxon countries as well as elsewhere by public employees called policemen. A policeman can exercise the power of arrest when a crime is being committed in his presence or when he has good reason for believing that a certain person has committed a crime. But the power of summary arrest by private persons and by policemen has always been limited as much as social welfare would permit, in order to restrict abuse of this power and violation of individual rights. The power of arrest has been exercised as much as possible by means of warrants.

A warrant is a written mandate issued by a magistrate or other judicial official directing a public employee or a private person to arrest a certain

person and to bring him before the proper authority for examination or trial. It is evident that the issuing of a warrant creates a little delay which gives time for deliberation thus preventing hasty and ill-considered action. Furthermore a warrant is in many cases sworn out on the strength of a charge made by a private person who makes himself liable to a severe penalty if the charge proves to be very ill-founded. Thus individual liberty is safeguarded and protected and the power of summary arrest is used only when a criminal is almost certain of escaping if immediate action is not taken. In French procedure a *juge d'instruction* or examining magistrate has the power at first only of issuing a warrant to appear which is a simple order to present one's self which cannot be carried out with force. If, however, this order is not heeded a warrant to bring may be issued which may be carried out with force.

When an arrest has been made summarily or by means of a warrant, the prisoner is brought before a magistrate for examination as soon as possible. It is usually required that this examination be held within twenty-four hours. In French procedure if the prisoner responds to a warrant to appear he must be examined immediately. If the magistrate has final jurisdiction over the offense with which the prisoner is charged he may dispose of the case at once. But if he has not final jurisdiction his examination must result either in dismissal of the charge on account of utter lack of foundation or in preliminary detention or provis-

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ional liberation. Preliminary detention is effected in common law procedure by a commitment to a place of imprisonment. In French procedure it is effected by a warrant to hold in custody or warrant of arrest (*mandat de dépôt ou mandat d'arrêt*). The necessity for preliminary detention depends upon the character of the prisoner and of the case. If there is little danger of the escape of the prisoner or if the charge made against him is a very unlikely one, the magistrate will grant provisional liberation. But if there is great danger of the flight of the prisoner, preliminary detention is necessary to prevent this. It may also be necessary to prevent destruction of evidence of guilt. In French procedure the magistrate can issue an order forbidding the prisoner from communicating with anyone, except his counsel, if he thinks the prisoner may secure the destruction of evidence of guilt by communicating with his accomplices. This interdiction lasts for ten days after which it may be renewed once. It is a relic of the old inquisitorial procedure and was a method by which confessions were forced from prisoners even sometimes when they were innocent. This power has been considerably modified in order to prevent this abuse. In lawless countries preliminary detention is sometimes necessary to protect the accused from the vengeance of his opponents.

Preliminary detention is a necessary measure of social defense. It is, however, a serious encroachment on the liberty of the individual, for the prisoner has not been found guilty as yet and is

presumably innocent. Therefore this period of detention is not punishment. If the prisoner is found guilty it is usually transformed into punishment and deducted from the length of imprisonment. If, however, he is acquitted he will, notwithstanding his innocence, have suffered this period of imprisonment. In order to repair in some measure the injury done by this imprisonment, indemnity is sometimes given. The principle of indemnification for preventive detention endured by innocent persons was suggested by Frederick the Great in 1776 but was not then put into effect. Imperfect legislation applying this principle has been passed in some of the Swiss cantons, in Sweden, Norway, Hungary and Denmark. Laws were passed in Germany in 1898 and 1904 which were based on the following principles:

1. Indemnity is given as a legal right.
 2. It is given only when innocence has been proved.
 3. It is not given if the defendant has caused his own arrest by carelessness or on purpose.
 4. Indemnity is given only for material damages.
- The tribunal that acquits must always decide if indemnity is owing and grant it.

Various precautions are taken to make as little irksome as possible this liability to arrest, thus safeguarding individual rights and liberties. Examination is guaranteed within a short time after arrest, usually twenty-four hours. In the common law the writ of *habeas corpus* is an order issued by a court directing that a person in confinement be

brought before it in order to determine the legality of the confinement. But the principal measure used to make preliminary detention unnecessary is provisional liberation. The granting of provisional liberation depends partly on the law and partly on the judge. The law specifies which crimes are bailable and which are not, so but a certain amount of discretionary power is left to the judge. The liberation is usually on bail which depends on the giving of a certain amount of security by sureties or by the prisoner himself. Beccaria has expressed in the following passage the necessity of making this period between the arrest and the final decision as little burdensome as possible for the accused: "Imprisonment being no other thing than a means of making sure of a citizen until he is judged guilty, and this means being essentially vexatious, it should be as little harsh as possible, and should last only just as long as is necessary. Its duration must be measured by what the examination of the action absolutely requires and by the right that those who have been detained the longest have to be judged. The guilty person must be restricted only as much as is necessary to prevent him from escaping or from hiding the proofs of his crime."¹ Unconvicted prisoners should, therefore, be given the best possible treatment. They should not be imprisoned with convicted criminals as is now done, but should be detained in a place not a prison and much more comfortable than an ordinary prison.

¹ C. Beccaria: *Crimes and Punishments*, Chap. XIX.

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The second part of the repressive function of the police is that of searching for evidence. It is evident that the police have a most favorable opportunity for securing evidence since they are always on the watch for crime and criminals. It is, therefore, important that they should be used as much as possible for gathering evidence. To accomplish this they are given a certain amount of power to search residences and to seize evidence when delay incurs danger of the disappearance or destruction of evidence. Otherwise this can only be done under authority from a magistrate, thus safeguarding the accused and other private persons from search and confiscation of property without valid reason. But the police have not yet been sufficiently utilized in this work of gathering evidence. They frequently fail to secure evidence because they are ignorant of what is evidence. On the wall of the classroom of the school for the scientific police in the *Palais de Justice* at Paris is written: "*L'œil ne voit dans les choses que ce qu'il y regarde. Et il ne regarde que ce qui est déjà dans l'esprit.*"¹ The police need to be taught what to observe while on the watch for crime and criminals or when on the scene of a crime. Many of the details which are of great value as evidence escape their notice because they are ignorant of their significance. To teach them what is really significant as evidence is the object of the scientific instruction of the police which is being given in

¹"The eye sees in things only what it looks for, and it looks only for what is already in the mind."

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various places on the Continent. This question of the instruction of the police we will take up again a little later when discussing the personnel of the police.

This function of the police necessitates their acting as witnesses very frequently. The testimony of the police is notorious everywhere for its partiality against the accused. A number of reasons may be cited for this partiality. In the first place there is the psychic effect upon the policeman of his work. Because he is constantly on the lookout for criminals, he tends to regard every person he finds under suspicious circumstances as a criminal and consequently testifies against him. The policeman is open to the same danger as the judge, only to a much greater degree, for the judge hears the evidence for both sides in the course of the trial, while the policeman usually knows only the evidence against the prisoner. Furthermore the policeman frequently has a personal reason for wanting to testify against the prisoner. If he has used the power of summary arrest in arresting the prisoner it is to his interest to secure a conviction in order to sustain his reputation for good judgment in using this power. Leaving aside those who are corrupt on entering the police service and those who become corrupt from their relations with criminals, it is evident that these two causes tend to vitiate the value of the testimony of any policeman however honest and faithful to his duties he may be.

But another cause tends to vitiate still more the

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value of the testimony of the police. A policeman is too frequently placed in the position of a public prosecutor. Especially true is this in England where in the place of a regular system of public prosecution the police conducts in many cases the prosecution which is in theory private. In such cases the policeman is placed in the extraordinary position of being both the public prosecutor and a witness. The viciousness of this situation is most apparent. Testimony under such conditions is almost certain to be biased and partial.

The English system tends to make prosecuting a function of the police. This, however, can never be a valid police function not only because policemen have to serve so frequently as witnesses but also because it is a duty of the police to protect the innocent as well as to apprehend the guilty and, therefore, they should not be placed in a partizan position towards their prisoners who are still presumed to be innocent. The position of the policeman should be as unbiased as that of the judge. They represent the beginning and the end of the procedure and the functions of both should be administered with the utmost impartiality. Partizanship should be permitted only in the contradictory debate on the part of the prosecution and the defense. The only reason for admitting it at this point is that this debate when well-balanced is the best method of presenting evidence. The function of prosecuting should be completely removed from the police in England and wherever, as in the United States, there is a tendency to leave the

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prosecution of minor offenses in the hands of the police.

The question of how to remove the first two causes of partiality in the testimony of policemen, namely, the psychic attitude of the policeman towards criminals and his interest in securing conviction, is more difficult. The first may be counteracted in part by carefully instructing the policeman that his function is not only to apprehend criminals but also to protect the innocent and by constantly reminding him of this fact. As to the second, social defense requires that the police shall have the power of summary arrest and a policeman is almost certain to have a personal interest in securing conviction in every case where this power has been used. But the evil results from this personal interest could be in part prevented if the police were not to so great an extent the agents of the prosecution or were equally the agents of the prosecution and of the defense. Also by making the contradictory debate better balanced and therefore more effective, as we shall see it in the next chapter, a check would be put upon the partiality of the testimony of a policeman.

We now come to the very important matter of the personnel of the police. The question as to whether it is well to divide the police into two branches, administrative and judicial, may be raised. This division is probably preferable for the administrative function because the administrative police not having so much power do not acquire an offensively aggressive manner and perform their

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work much more courteously and quietly. This is very noticeable in the French *sergents de ville*, who belong to the administrative police. This division may, however, be no gain for the repressive function, because the administrative police do not give so much assistance in performing this function. On the other hand it might be possible to give a special body of judicial police a better training for performing the repressive function than the whole of the police force. And this is the important question in connection with the personnel of the police force. Whether a part or all of the force devotes itself to performing the repressive function, all ought to have a certain amount of preparation for this work, while a certain number should have a special training.

It is evident that the members of a police force must always be men of a rather low grade of education and intelligence. It would be very costly to employ men of a high grade to do this work and, furthermore, since much of it is of a menial sort, such men would be unwilling to do it. It would, therefore, be impossible to give them a philosophic conception of the system of penal repression and of their function in it. But it is well, as has been suggested, to teach them their specific duties and their relation to criminals on the one hand and to innocent citizens on the other, this last in order to prevent them from abusing their power. Furthermore, they must be taught to use scientific methods in performing their duties. It is not necessary to teach scientific theory, but the applications of

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theory, as, for example, the technique of criminal anthropology which will enable the policeman to recognize the criminal type, the scientific methods for the identification and examination of the traces of crime, anthropometry, dactyloscopy, etc.

Several courses and schools for teaching scientific police methods have been started. In 1896 Ottolenghi started a free course at the University of Siena.¹ In 1903 it was transferred to Rome, officially recognized by the government and made obligatory for police functionaries. The program² of the work of this course will give some idea of the kind of training the police ought to have.

I. Generic Identification—(1) somatic (2) photographic (3) anthropometric (4) functional (5) psychological (6) anamnestic.

II. Specific Identification—(1) dangerous classes according to the scientific criterion (2) dangerous classes according to the practical scientific criterion (3) dangerous classes according to the law of public surety (4) the criterion for the application of the law of public surety.

III. The Scene of Crimes—(1) evidences of crimes (2) investigations for crimes against persons (3) investigations for crimes against property.

¹ E. Ferri: *La sociologie criminelle*, Paris, 1905, p. 518.

² Prof. S. Ottolenghi: in the *Archives d'anthropologie criminelle*, 1903.

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IV. The Search for the Criminal—(1) he is known (2) he has left traces (3) he is unknown.

V. The Functions and Organization of the detective force.

✓ The agents of the public surety on the Continent correspond to detectives in England and in the United States and are almost the only police agents who have been given a special training. In the *Palais de Justice* at Paris is the school started by Bertillon for the employees of the identification bureau and the agents of the public surety. The course lasts three months. The detectives are taught the spoken portrait (*portrait parlé*) by means of many photographs representing every type of each feature of the physiognomy. Every variation of the color of the eyes is taught by means of glass models of eyes. At the end of the course each student must identify one out of two hundred or more persons walking around in the courtyard of the *Palais de Justice* by means of a description or spoken portrait which has been furnished him. A similar school has been established in Spain and at the University of Lausanne in Switzerland Professor Reiss gives a course in scientific police methods. But the teaching and study of these methods have been restricted so far almost entirely to methods of identifying criminals. The study should be extended so as to include the traces of crime, etc. The instruction should also be made more general so that every policeman should have a certain amount of training, while a special class

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like the detectives to-day' should have a special training in all the scientific police methods for repressing crime.

Several methods of identifying and classifying criminals have been devised and have been carried to so high a pitch of perfection that it is practically impossible for a recidivist to hide his identity in the country where he has committed a crime. It is also possible to trace a record in a foreign country by means of correspondence provided the same method of identification and classification is used in the two countries.

The first scientific method of identification was the anthropometric system developed by Bertillon at Paris.¹ This system consists in the measurement of certain distances on the human body which remain the same from maturity to death. These measurements include the height, the left middle finger, the left foot, the left forearm, the face, the little finger, etc. In order to catalog the records each measurement is divided into three classes. For example, the first measurement divided is, let us say, the height. This at once divides the records into three classes. Then each class is divided into three classes according to another measurement, let us say, the face. This process is continued with a certain number of measurements until the number of records in which it is necessary to search for an individual record is comparatively small. This last quantity of records is divided into seven parts

¹Cf. Edmond Locard in the *Archives d'anthropologie criminelle*, Lyons, March, 1906.

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according to the color of the eyes. In the last division is to be found the record of the criminal if his record has been taken previously. If one of the measurements is on the border-line between two classes and the record is not found in one of them, search is made in the other class as well. The anthropometric system permits of an exact classification and by means of it a record can be found very quickly. But this system is not applicable to immature persons whose measurements are not yet fixed. It is also rather difficult to apply to women because the hair on the head causes errors in measuring cranial distances. Furthermore the system requires complex and rather costly machinery and the measurements require a certain amount of time.

The anthropometric system at first served only to identify criminals after they were caught.¹ But it was also important to use it to catch a criminal who was free under a false name. Photography had been used from the first as complementary to the anthropometric measurements. But the photographs were of little or no use in searching the records because it was impossible to classify them. They were furthermore very expensive. They had, however, some utility in helping to capture a criminal in freedom. If a detective could see the photograph of a criminal he was much more likely to recognize him. But even this use was rather limited. It is usually necessary to search for a criminal in several places at once. It was not easy to

¹ Cf. C. Lombroso: *Le crime*, Paris, 1907, pp. 303-304.

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send photographs everywhere where the criminal might be and to do this required some time. To supply this need for a means of identifying in the field the so-called "spoken portrait" (*portrait parlé*) was devised by Bertillon. This is a description of the physiognomy, especially of the right ear and nose, and also of the person in general. It is difficult to classify these spoken portraits because their systematization is not absolutely mathematical. But the spoken portrait is the best means so far devised for identifying in the field. Copies of a spoken portrait can be sent easily and cheaply to every place where the criminal is likely to be. If there is great haste it can be telegraphed. It is, however, essential that the police agents who use these portraits should be very well trained so as to recognize at a glance the subject of a spoken portrait and to make no mistakes by arresting wrong persons.

A description of the color of the irises is complementary to the spoken portrait. This is easy to classify and to search for in the records. It is, however, easy to make mistakes and much practise is needed to determine the exact shade of color. This method has been much used by Bertillon for women and children.

A description of tattoo marks and scars is complementary to anthropometry. They cannot be classified or searched for in the records but can be added to an anthropometric record. Their record requires a good deal of space and therefore

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Bertillon and Vucetich of Buenos Ayres have devised systems of abridged description.

Another system of identification which is rapidly becoming more important is by means of finger prints or dactyloscopy which has been developed by Galton, Coutagne, Florence, Henry and others. This system consists in taking imprints of the digital extremities of the two hands. These imprints remain the same from the sixth month of the intra-uterine life until the decomposition of the body and as the imprints of two person have never been found to be identical the record of the finger prints forms a perfect means of identification. Various methods of classification are being used. All of them are based on the types of the configuration of the lines on the tips of the fingers. These types are whorls, arches (ordinary and tented) and loops (radial and ulnar). The most complicated system of classification is that used by the English police which is based not only on the types of the configuration of the lines but also the number of lines on certain fingers between the so-called delta where the lines of the tip of the finger commence and the center of these lines.

Dactyloscopy can be applied to persons not entirely developed as well as to adults, because the finger prints remain the same throughout life. It is easier to learn than the anthropometric system since no special knowledge of the human body is necessary. The method of taking the record is simple and precise and therefore rapid. The apparatus is very simple and inexpensive, consisting

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only or an ink pad and blank, so that the imprints can be taken almost anywhere immediately after an arrest. When classified a record can be searched for as easily as in an anthropometric system. These advantages of dactyloscopy have resulted in its superseding the anthropometric system in certain places. In England the anthropometric system was abandoned a few years ago and dactyloscopy is now the only means of identification. The system has been very thoroughly developed. At the police headquarters at New Scotland Yard in London there is a photographic apparatus by means of which prints are enlarged if there is any difficulty in counting the lines. Finger prints on tools, bottles, etc., used by criminals are photographed and have in a number of cases aided in capturing the criminals. In France the anthropometric system is still the basis for classification and the finger prints are only complementary. But the tendency is towards abandoning anthropometry and adopting dactyloscopy as the basis of classification and this tendency seems justified by the advantages of dactyloscopy.

But dactyloscopy furnishes a means of identification only when the criminal is caught. It is a defect of the English system that it furnishes no means of identification in the field. Therefore though we may abandon the anthropometric system we must retain the spoken portrait which has grown out of that system. Otherwise dactyloscopy alone will furnish no clue for the identification of the criminal in the field. With a system of

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identification made up of dactyloscopy and of the spoken portrait it will be practically impossible for the criminal to hide his identity when caught and very difficult to avoid capture when free.

But this will be true only within the jurisdiction of the system of identification, while it should be made impossible for a criminal to hide himself in any part of the world. A certain amount of correspondence now goes on between the police systems of different countries and criminals are sometimes identified in foreign countries. But the possibility of doing this depends upon the similiarity of the systems of identification and classification of two or more nations. For example, it is possible for the French police to secure the identification of a French criminal in the English records by sending to London the dactyloscopic record. But it is impossible for the English police to secure the identification of an English criminal in the French records because the French records are classified according to the anthropometric measurements which are not taken by the English police. An international system is needed by means of which criminals can be traced in any part of the world. It has been suggested that a congress be called to establish such a system. It is doubtful if a congress could accomplish this at the present time because there is too great a variety of systems and it would be impossible to come to any agreement. But it is to be hoped that in the course of time the best system will be universally adopted. Then it will be possible to have an international blank

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record which will be uniform all over the world. There will be a numerical telegraphic code by means of which a description can be sent to any part of the world at a low cost. There may even be international police bureaus (perhaps one for each continent) where the records of the principal criminals will be kept. Upon each record will be the finger prints, the spoken portrait, a description of the most important marks on the body and the name, place of birth and of residences and condemnations. This record would be an amplification of the *casier judiciaire* as it exists in France. It would not be as extensive as the *cartella biografica* or biographical chart as proposed by Ottolenghi¹ which gives the anthropological and sociological characteristics of the criminal thus making possible a classification according to the type of criminal. Whether as extensive a description as this will ever be necessary remains to be seen.

An important question in the administration of the police force is as to what officials are to direct it. Every police force has, of course, within itself its grades and officers. But the police, as a whole, stands in the lowest rank of the system of procedure and therefore is subordinate to the other branches of the procedure. Generally speaking they are directed by the judiciary as a whole. But as a matter of fact they are usually directed by the examining or police magistrates. The reason for this is very evident. These magistrates issue most of the

¹ S. Ottolenghi: *Archives d'anthropologie criminelle*, Lyons, June, 1906.

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warrants by means of which arrests are effected. They conduct the first examination after arrest. They are in the best possible position for watching the work of the police and knowing whether it is being done faithfully and well. Their position is a strictly impartial one, so that they can guard against any tendency of the police either to violate individual rights or to neglect social defense. But in order to do this work of supervision most effectively, a magistrate should have some knowledge of police methods. It is very unwise to appoint, as is done to-day, examining magistrates from any branch of the legal profession regardless of their lack of special training. Some attempts to remedy this have been and are being made on the Continent by giving courses on scientific police methods in law schools. Professor Niceforo has given such a course at Lausanne¹ and Dr. Hanns Gross gave a course for a time first at Graz and then at Vienna for higher police officials and examining magistrates in which were taught scientific police methods as well as the psychology of testimony. The substance of this course has been published in a book² which shows very clearly the possibility of developing a special training for examining magistrates. In addition to training in the law school it might be well for candidates for the position of examining magistrate to be connected for a time with the police force in the work of supervising the

¹ Dr. Edmond Locard: *Chronique Latine* in the *Archives d'anthropologie criminelle*, Lyons, 1904.

² Hans Gross: *Manuel pratique d'instruction judiciaire*, Paris, 1899.

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gathering and classification of evidence, thus acquiring a direct acquaintance with police methods. This subject will be more fully discussed in our chapter on the judiciary.

The public prosecutor also has a certain amount of authority over the police. We have already noted the evil results from this in the tendency of the police to become agents of the prosecution instead of maintaining a strictly impartial position. And yet the prosecution must have the aid of the police in the pursuit of criminals. The only way to solve this difficulty is to give the defense as much authority over the police, thus counterbalancing the influence of the prosecution. The defense could then use the police in gathering evidence. But this would hardly be possible under a system of private defense. To put the police under so shifting and uncertain an authority as private counsel would be very disconcerting for them and would tend to disorganize the police force. The only solution is to have a system of public defense corresponding to the public prosecution such as will be described in the following chapter.

In France the prefects and mayors have a certain amount of authority over the judicial police. These officials are, strictly speaking, officials of the administrative police. The repression of crime is not the peculiar function of this branch of the police but very naturally it informs the judicial police when it is aware of crimes which have been committed. Administrative officials frequently denounce such crimes and a certain amount of authority has

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been given them to take an active part in the investigation of the judicial police. This has seemed wise from the point of view of general safety in order to bring the two branches of police closer together and to utilize the information of the administrative police in repressing crime. On the other hand it is condemned because it confuses administrative and judicial functions. The administrative officials are responsible to the government in power and thus the government is given a certain amount of influence in judicial matters. The prefect, who is responsible only to the government and is quite independent of the courts of appeal, has as much power as a *juge d'instruction*.

The press may be used by the police to aid in capturing criminals. It is true that the press does more or less to stimulate criminality by publishing sensational accounts of crimes and criminals which incite others to emulate and imitate. But this is no reason why the press should not also be used to aid the police in repressing crime. "In Switzerland, the government has a kind of manual containing the photographs and biographies of the best known Swiss criminals. In Germany has been introduced the practise of inserting in the announcements of the most popular journals, the description, the rewards offered and even the photographs of the criminals whose arrest is most necessary. At Mayence (Germany) is published a journal in three languages: French, German and English: *Internationale Criminal Polizeiblatt*, *Moniteur International de Police Criminelle*, *International Criminal*

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Police Times, which goes out every week and which is edited by the councilor of police, the *Polizeirath*, and contains the portraits and marks of the criminals sought for.”¹ At Cairo also is published a weekly police journal with the descriptions, photographs, etc., of criminals who are wanted. “It is thus that the press, and particularly the advertising of the journals which until now has been most often a source of blackmail, of swindles, and of calumnies can become a means of social defense.”² An international police press could very well be started giving news of criminals wanted in any part of the world.

The public also can give some assistance. Popular accusation was based on the theory that the public was sufficiently interested in the repression of crime to ensure the prosecution of every crime by a member of the public. It failed because the public has not a sufficient amount of interest. But to the extent that the interest of the public can be aroused and that it can be induced to aid by furnishing information and evidence it is well to do so. One reason for the publicity of the examination in Anglo-Saxon procedure is to stimulate this interest.

The international character of police activity should be extended as far as possible. The battle against crime is common to all countries and they may well combine in carrying it on. We have already suggested an international identification

¹ C. Lombroso: *Le crime*, Paris, 1907, p. 307.

² C. Lombroso: *Op. cit.* p. 307.

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service and an international police press. An international police union might be formed which would internationalize still more features of police activity. It has even been suggested that such a union should have its relations independent of ministers of foreign affairs. This would, of course, depend upon international politics and may not be possible now, but everything which tends to unify the police activities of the world should be encouraged.

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CHAPTER VIII

PROSECUTION AND DEFENSE

In a previous chapter on the systems of criminal procedure we have seen that prosecution and defense do not exist, strictly speaking, in the procedure of investigation but that they have been introduced into the systems based on the procedure of investigation as well as those based on the procedure of accusation because they furnish the best means of producing evidence in the course of a trial.

The preliminary stage of prosecution is called *accusation*. An accusation may be made by a private person or by a public agency. A private accusation is made by the injured party or by "those of his lineage," or it may be popular, that is to say, made by any citizen. Public accusation may be made by a number of public agencies. As we have already noted, in the inquisitorial procedure there was no prosecution, but the tendency in all inquisitorial systems was for the judges to become prosecutors. So clearly recognized was this in the ancient French law that it was expressed in the maxim that "every judge is an attorney general." But it is very evident that prosecution by a judge predisposes

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him to believe in the guilt of the prisoner. For this reason the power of the judge to prosecute was abolished at the French Revolution. The power of prosecuting was put entirely into the hands of the public prosecutor. But it was feared that this official might sometimes fail to perform his duty. It was therefore provided that a court of appeal might hear a denunciation of a crime or misdemeanor made by one of its members and then require the prosecutor to prosecute. Thus was established a form of judicial surveillance over public action.

Accusation may be made by the grand jury in Anglo-Saxon procedure. An *indictment* is not, strictly speaking, an accusation by the grand jury since the accusation has already been made by a private individual or the public prosecutor. But a *presentment* is an accusation made by a grand jury at its own initiative and is, therefore, the veritable form of accusation made by the grand jury. It may be questioned whether this is a form of public accusation. It is true that at one time the grand jury was no more than a group of private individuals who came to lay their own or their neighbors' grievances before the judge. But though the grand jury is still formed of private individuals they are no longer personally interested in the cases brought before them, their only interest being the public welfare. But the public accusation is usually made by the public prosecutor. In American law it is made by means of the *information* which is a written accusation presented under oath

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to a court having jurisdiction of the offense charged therein.

It has been an important question in criminal procedure whether accusation should be public or private. If it is private then the citizen is the sole arbiter of the social function of repression. This was the case in the system of accusation before the penal function had come to be recognized as a social function. But as we have seen, this proved to be dangerous to society since many crimes went unpunished. On the other hand it may be questioned whether it is safe to make the public prosecutor the sole arbiter of the necessity of action. The injured party has the right to take civil action as a guarantee against the negligence or malfeasance of the public prosecutor. But this does not satisfy the claims of social defense if a crime has been committed. As we have seen, in France a court of appeal can sometimes force a public prosecutor to take action. Under certain circumstances a private individual can do the same, as is the case in Germany and in Austria,¹ thus forming a private accusation subsidiary to public accusation. Another check upon the public prosecutor is the popular accusation. But it would not be expedient to make this form of accusation at all general for it would result in many ill-advised and malicious accusations. It should be limited to crimes of very general interest such as those against the freedom of thought and speech, the abuse of public functions, etc.

¹ E. Ferri: *La sociologie criminelle*, Paris, 1905, p. 501.

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Should accusation, therefore, be public or private? We have noted some of the checks on accusation by the public prosecutor. These are, however, very slight. Judicial surveillance over the public prosecutor is limited by the danger of putting the judiciary in the attitude of a prosecutor, which must be carefully guarded against. Subsidiary private accusation opens the door for ill advised and malicious accusations and is a tendency to revert to the times when punishment was private vengeance. Popular accusation is limited to a peculiar class of offenses comparatively few in number. It is, therefore, evident that it is hardly practicable to combine public and private accusation. Is it then necessary to return to private accusation or to accept an almost unmitigated system of public accusation? The first is hardly conceivable. The principle of social defense is too firmly established to permit it and the universal tendency is the other way. The second on the other hand is accompanied by no serious dangers. A public prosecutor is not likely to fail to accuse in any case where there is any probability of guilt. His *esprit de corps* will almost invariably lead him to do so. As we shall see, the problem is rather to strengthen the means of defense against public prosecution. Public accusation by no means destroys the advantages of private accusation, for the public prosecutor still depends very largely on information furnished by private individuals of crimes which have been committed. Further reasons for public accusation will manifest themselves in our study of prosecution.

Prosecution follows immediately after accusation. There is no radical distinction between the two since both belong to the same continuous process. The distinction is one of terms and is made to distinguish two stages in this process. Accusation is the preliminary stage and prosecution the formal stage. The distinction is of value because the two may not be carried on in the same manner. [Accusation may be private and prosecution public. This is in fact the way in which public prosecution has developed. It would, however, hardly be possible for accusation to be public and prosecution private and it is doubtful if this has ever been the case.

Private prosecution like private accusation belongs to the procedure of accusation, since it is a part of a process between two individuals. As we have seen, the present tendency is away from it even in England, the classic country of the procedure of accusation. It is true that in recent years a number of crimes have been created, mostly of a commercial character, which must be prosecuted by private individuals but these are crimes of the quasi-criminal type on the border line between civil and criminal actions and it is an open question whether or not they are crimes. A check to the ill-advised or malicious use of this right of private accusation is the right of the injured party to bring civil action for damages and in some of the more serious cases criminal as well as civil action.

Public prosecution is, as we have seen, a combination of the procedures of accusation and of

investigation. It is like the procedure of accusation because the prosecuting is done by a person other than the judge. It is like the procedure of investigation because the prosecuting is done in the name and interests of society. It makes of procedure a process between society and an individual unless a corresponding change is made in the defense. The manner in which the public prosecutor represents society varies somewhat in different places. In France, Germany and elsewhere on the Continent he is the representative of the central government. In England various public agencies prosecute, such as the police, the Solicitor for the Treasury, etc. In the United States he is a local representative, usually of the county.

We have already considered some of the reasons for favoring public over private prosecution. The discussion is in truth rather academic since the universal tendency is towards public prosecution. And as we look towards the future we see still more reasons for this tendency. As we have seen, the tendency of to-day is towards the individualization of punishment. The treatment of criminals is to be determined more and more by the character of the criminals. It is, therefore, imperative that all those connected with the judicial system shall have knowledge of the criminal character as well as of the laws. Especially important is this for the prosecutor in order that he may be governed in taking action against an individual by the character of the individual to the extent that it has been revealed as well as by the crime of which he is accused.

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The important question, therefore, is that of the personnel of the prosecution. It is evident that private prosecutors cannot have the special training necessary to judge the character of the accused. It is necessary to have a body of public prosecutors with special training. This training should commence in the law school with the study of criminal anthropology and sociology in addition to the study of law. It should be followed with practical experience in prisons and in connection with the police. This question of the special training of the public prosecutor we shall take up again in the latter part of this book when outlining a new system of procedure. But another question in connection with the personnel of the public prosecution must be spoken of here. It is a well known fact that the effect of his position on the public prosecutor is to make him regard every person upon whom suspicion of crime has fallen as guilty. This is a natural result of continuous work as a prosecutor but it is a very unfortunate result. Though it is the duty of the public prosecutor to prosecute every case with all the force that the facts in the case justify, he should maintain an unbiased attitude towards those accused in order, in the first place, not to be too hasty in commencing prosecution and, in the second place, in order to restrict himself in the course of the prosecution strictly to the facts and not to add to it the force of a purely personal feeling. Now it is very evident that to counteract this bias which is bound to develop in the course of continuous prosecution it is necessary to put the

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prosecutor at times in the position of defender. This would be possible only under a system of public defense which we shall discuss a little further on.

✓ We have seen that under a system of private accusation and prosecution the accuser takes certain risks. If his accusation proves to be unfounded he is liable to a civil action for damages. If, furthermore, his accusation was malicious he is liable to criminal action as well. The principle of social defense fully justifies society in assuming the right to accuse and prosecute, but the question may well be raised whether it should not assume also obligations corresponding to those assumed by a private accuser. It would be impossible to bring a criminal action against society, but it could pay indemnity to the innocent victim of public prosecution. This principle has been advocated again and again for several centuries and it is doubtful if there are many who would oppose it to-day even among the conservatives. It might be contended that individuals ought to be willing to endure this hardship for the sake of society. But the hardship certainly is too great to demand this sacrifice from those who are so unfortunate as to fall under suspicion of crime and the practical results from it are frequently very disastrous. A feeling that he has been unjustly treated remains to rankle in the mind of the victim and the idea tends to become prevalent that criminal justice is not as just as it is supposed to be. In order to counteract the spread of this idea—which is,

indeed, pretty well founded—every possible means should be taken to indemnify the innocent victim of public prosecution. Such indemnification should be in the first place for those who have been condemned and who may have already served a part or the whole of their sentences but who on a revision of the process are found to be innocent. But it should be also for those who are acquitted but who have suffered loss of time and money and mental anguish as a result of being prosecuted. That such indemnification is perfectly practicable is indicated by the large number of laws which have been passed providing to a more or less extent for such indemnification. Such laws have been passed in Portugal in 1884, in Switzerland in 1886, in Denmark in 1888, in Austria in 1892, in Belgium in 1894, in France in 1895, in Germany in 1898 and in 1904, and in many other countries.¹ We have already discussed the German laws in connection with the question of preventive detention,² and have seen that it is given only when innocence has been proved and not when the accused has caused his own arrest and trial by carelessness or on purpose. It is given only for material damages but it is given as a legal right by the tribunal which has acquitted the defendant without any action on his part being necessary. The practical realization of reparation for judicial errors will undoubtedly be greatly aided by the reform advocated by the positive school. As Ferri has expressed

¹ E. Ferri: *Op. cit.* pp. 502-504.

² See Chapter VII.

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it, "it is facilitated above all by the restriction of penalties of imprisonment which are much employed to-day, and by the more frequent use of pecuniary reparations under the form of fines or indemnities, it finds consequently in the repressive system of the positive school much more favorable conditions and greater probabilities of practical realization."¹

Another principle which may not be assented to by so many as will assent to the preceding is that of reparation to the plaintiff whenever injury has been experienced as a result of the crime. And yet it can be deduced very logically from the principle of public prosecution, to say the least, theoretically. Society has undertaken to protect its members from crime. When it fails to do so it undertakes the prosecution and punishment of the criminal in order to protect society from crime in the future. But the punishment of the criminal does not benefit the victim of the crime. It does not compensate him for the injury he has suffered on account of society's failure to protect him. He has only the right to commence a civil action for damages. Since this is a slow and uncertain process the action is in most cases never started. But civil action in this case is inconsistent with the fundamental theory of the civil law. This theory is that a right in civil law is based upon a contract. It is evident that there is no contract in the case of a crime. Such an act is committed by a criminal with violence and without the consent of his victim which

¹ *Op. cit.* p. 502.

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would be necessary to form a contract. It is, therefore, an integral part of the system of social defense to guarantee reparation to the victims of crime. This does not mean that the State would always have to furnish the reparation. In the majority of cases probably it would be possible to force the criminal to make the reparation and this would be a most effective form of punishment. A suggestion as to such a system is offered by some of the American courts in which probation is practised. The judge will grant probation on condition that reparation is made and the probation officer supervises the payment of this reparation. We have not sufficient space to discuss the practical working of such a system but it was necessary to show its logical consistency with a procedure based on the principle of social defense.

Prosecution and defense belong, as we have seen, to the procedure of accusation. In the pure form of this procedure both prosecution and defense are private. Gradually, however, through the influence of the procedure of investigation, prosecution became public. But the defense remained for a long time private. The helplessness of the defendant in the face of an organized prosecution carried on by trained prosecutors became so evident that in the English courts the judges began to watch over the interests of the accused and became to a certain extent counsel for the defense. This state of affairs is recognized in the following passage from Blackstone in which there is also severe criticism of the weakness of the defense. "It is a settled

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rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise, proper to be debated. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. And the judges themselves are so sensible of this defect that they never scruple to allow a prisoner counsel to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact; for as to matters of law arising on the trial, they are *entitled* to the assistance of counsel."¹ The palpable injustice of this system led in the first half of the nineteenth century to the extension of this privilege of securing counsel to all those prosecuted for crime and for matters of fact as well as of law. So that if a defendant has the means to employ counsel as able as that employed by the prosecution he is likely to obtain justice in the trial. But even in such cases there are several criticisms to be made of this system of procedure. As we have already noted, public prosecution introduces the underlying principle of the procedure of investigation and throws the balance in favor of society as against the individual. The defendant is then left to readjust this balance by his own effort.

¹ *Commentaries*, Book IV, Chap. 25.

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Furthermore, it is an axiom of the law of evidence that a person accused of crime is presumed to be innocent until found guilty. But this system violates in practise this presumption of the law of evidence, for society does all it can to convict him but almost nothing to secure for him an adequate defense.

If, however, a defendant is poor, as many of them are, he is unable to secure counsel and the balance remains in favor of society. This system is, therefore, positively unjust for the poor defendant. It is true that a form of official defense is provided; but this is, as a rule, little better than a farce. When a defendant is unable to employ counsel it becomes the duty of the judge to assign a lawyer practising in his court to take charge of the defense. The usual result is that this lawyer endeavors to ascertain the financial resources of the defendant in order to determine whether there is any possibility of securing a fee for the services which it is his duty to perform. If there is no such possibility his wish is to dispose of the case with as little trouble as possible. To do this he tries, first of all, to persuade the defendant to plead guilty. If he succeeds he is relieved from the necessity of spending time and trouble in conducting the trial. The defendant, however, may protest his innocence and insist upon a trial. The lawyer will then give to the preparation for the trial as little time as possible. He gives to the defendant a poor and weak defense in opposition to the carefully prepared prosecution of the prosecuting attorney. This is great injustice to the

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defendant who is so unfortunate as to be unable to employ counsel and many such defendants plead guilty rather than be tried with so poor a defense. In France the counsel in these pauper cases is assigned by the president of the bar association and a certain *esprit de corps* makes these French lawyers more faithful in performing this task. But even there the standard of official defense is much below that of private defense.

It is evident that in order to remove these evils it is necessary to take the next step which is also the final one in this historical development which has been bringing the efficiency of the defense up towards that of the prosecution. This is the establishment of a system of public defense. Institutions have already existed which suggest such a system. The tribunes of ancient Rome were ready to take the part of a defendant in a criminal case, thus helping to make justice impartial.¹ In Piedmont and in Naples there used to be an official called the "advocate of the poor" who acted as counsel in all pauper cases and such an official still exists in the city of Alexandria in Piedmont.² The next step is to provide public defense for all criminal cases by establishing a system of public defense corresponding to that of public prosecution and with equal powers and privileges. This is probably the most important and most necessary reform in the present system of procedure and is of the greatest significance for the development of

¹ C. Lombroso: *Le crime*, Paris, 1907, p. 398.

² E. Ferri: *Op. cit.* p. 524.

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a new system of procedure based on the data of the modern science of criminology.

We have seen that the innocent victims of public prosecution have the right to demand indemnification for the suffering, humiliation and loss of time and money they have undergone by being forced to stand trial for crimes of which they are ultimately acquitted. The least that society can do for them is to provide them with adequate defense. And yet they are left entirely to their own resources to secure this defense. If they lack such resources they are given the existing form of official defense which, as we have seen, is an utter failure.

Public defense in criminal trials would make it much easier to abolish the present vicious method of allowing defendants to plead guilty. This does not exist in Continental procedures and has resulted in a number of very grave abuses in Anglo-American procedure. Pleading guilty is permitted in order to expedite the business of the court. A defendant in a criminal trial is brought before the bar and asked whether he wishes to plead guilty. Many defendants, through ignorance of court procedure, or, in the case of immigrants, of the English language, are incapable of understanding this question. It frequently happens that one of these, who is not represented by counsel, will answer affirmatively to this question. He will plead guilty without knowing it and frequently without intending to do so. This glaring miscarriage of justice can happen because the defendant does not have adequate representation in court. If a public

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defender had charge of the defense this could never happen.

On the other hand, experienced criminals when charged with crime frequently take advantage of this opportunity to plead guilty. They will plead guilty with the utmost alacrity in order to secure the benefit of the leniency shown by the law and by judges as a reward. It often happens that a first offender who has stood trial and been convicted will receive a longer sentence than an old offender who has pleaded guilty to the same crime. Such grotesque mistakes as these would rarely happen if a trial were held in each case. In the course of the trial the past record of each defendant would be thoroughly exposed and it would be possible to judge according to the character and past record of the criminal. Public defense would make it much more feasible to have a trial in every case, because the public defenders would be ready to prepare carefully the defense and guarantee to each defendant a fair trial.

This feature of our present procedure tempts a public prosecutor to urge a defendant to plead guilty in order to save himself the time and trouble of prosecuting the case. He may threaten the defendant with unusually severe punishment if he insists upon a trial. He may offer to allow him to plead guilty to a lesser crime than the one with which he is charged. Or he may offer to ask the judge for leniency if the defendant will plead guilty. As a result poor and ignorant defendants are frequently frightened or coerced into pleading

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guilty. No defendant should be made to feel that he is jeopardizing his interests by insisting upon a trial. The public defender could shield the innocent defendant from the threats of the prosecuting attorney.

It may be contended that the abolition of the plea of guilty from our procedure would increase very greatly and to a considerable extent unnecessarily the work of our criminal courts. In the first place the increase would not be nearly as great as might be supposed, because the statement of the defendant that he is guilty would be taken as testimony as in Continental procedure and would greatly shorten and simplify the trial. Then in some cases the trial would prove that this testimony is not true. Insanity or a delusion of some sort makes some defendants think themselves guilty when they are innocent. Sometimes a defendant will for some hidden motive testify that he is guilty when he knows that he is innocent. A trial in most of these cases would reveal the falsity of this testimony and would prevent the punishment of an innocent person while in all cases a trial would furnish a better basis for the individualization of punishment by revealing more fully the character and past record of the criminal.

Public defense would almost entirely eliminate the disreputable lawyers who are so frequently to be found in criminal practise. The existence of these lawyers is favored on the one hand by the professional criminals who need the services of unscrupulous counsel and on the other hand by the

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poor and ignorant defendants whose precarious situation makes them the easy prey of such lawyers. With public defense, however, all the cases of the professional criminals and of these poor and ignorant defendants would be in the hands of the public defender so that the field of action of the disreputable lawyer would be destroyed. Thus public defense would tend to purify the legal profession.

The public defender could do much more effective work than the probation officer. This officer exists in certain of the courts in the states where probation or parole laws have been passed. His work is to prevent some of the abuses which have been described. As a rule he can have nothing to do with a case until the defendant has been convicted or has pleaded guilty. He is then directed by the judge to investigate the case. Having gathered as much information as possible he reports to the judge. He may also make some recommendation as to the best method of disposing of the case. Where the prisoner seems to have been convicted unjustly or where leniency seems desirable, he recommends leniency. He may thus prevent to a very small extent some of these abuses. But he is greatly limited in his powers and opportunities. His work is done in a more or less haphazard and incidental manner and his success depends largely upon the judges under whom he is working. He is usually unable to influence a case until after the greatest injury has been done and is then able to alleviate only to a slight degree the

effects of this injury. The public defender, on the contrary, would have charge of a case from the very beginning. He could prevent all of the abuses which have been described. He would not allow a defendant to plead guilty unintentionally. There would no longer be the conviction of innocent persons caused by the lack of efficient defense by lawyers appointed by the judge. The work of investigating the past record of prisoners about to be sentenced, now done by probation officers, could be done as well or better by the public defender. In most cases he would already have made this investigation while conducting the trial. The public defender would thus become the logical successor to the probation officer.

The public defender would frequently prevent long delays in bringing cases to trial. These delays are usually caused by the public prosecutor who is looking for evidence of guilt. The public defender would in the meantime be searching for evidence of innocence and would demand a trial as soon as he had obtained this evidence. Delay in bringing a case to trial is a great injustice to the defendant, especially if he is unable to give bail and is forced to wait in prison. The public defender, by securing proof of innocence, could in many cases prevent such delay.

The introduction of this system of public defense would probably meet much opposition from the bar. And yet from the point of view of the bar associations it should be favored because of the purification of the profession by means of the

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elimination of disreputable lawyers. Furthermore, many positions as public defenders would be created which would go to the better class of lawyers and a certain amount of the better kind of criminal practise would still remain. Public defense would not necessarily destroy all private criminal practise. Defendants would still have the privilege of employing private counsel if they so desired. It is impossible to determine at present whether it would ever be well for the public defender to allow a case to go entirely out of his hands. It might be well for him to have supervision in every case. The private counsel could then co-operate with him in defending the case. Thus public defense would leave a large field for honorable and dignified practise, either as a public defender or as a private counsellor.

Public defense would destroy most of the opposition which lawyers now make to reforms in criminal procedure, an opposition which grows out of the fear that these reforms will limit their field of practise. Since this one reform of public defense would fully realize this fear they would no longer have any further interest in opposing other reforms. Thus one great obstacle in the way of reforms would be removed.

So far we have been discussing public defense with regard to the present system of procedure and it can hardly be questioned that this is the most necessary reform in the existing procedure. But it is also of the greatest significance for the development of the procedure of the future. A

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fundamental principle of this procedure will be the individualization of punishment. But in order to individualize it is necessary that those who conduct the procedure shall be able to estimate at their true value the data which are accumulated with regard to the criminals. It is absolutely essential that the prosecutor and defender who accumulate and present the evidence shall recognize the data which are significant and shall present them most effectively. To accomplish this it is necessary that they should have training in criminal anthropology and sociology. So long as private defense exists it will be impossible to require this training of the defenders or at least only to a slight extent. But with public defense it will be possible to give both prosecutors and defenders a thorough training. This training would begin with specialization in criminological science in the law schools by those who wished to prepare for criminal practise. Already in a number of Continental law schools such courses have been introduced for those who expect to specialize in criminal practise and it is only necessary to make these courses obligatory, which would be possible if public defense existed. The theoretic study in the law school would be supplemented by practical study in connection with the police where the student would assist in the work of gathering and classifying evidence and in the prisons in close touch with the criminals themselves. After this clinical study he would be ready to enter practise either as a prosecutor or as a defender. It would probably be better in order to

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avoid any possible bias against the defendant that the young advocate's first duties should be as a defender. But a period of service as defender would be followed by a similar period as prosecutor and this alternation between the two offices would be continued. This interchange between the personnel of the prosecution and of the defense would give a wide experience to all the members of the criminal bar and would prevent the bias which now tends to develop either for or against the defendant through exclusive work either for the defense or for the prosecution.

In the latter part of this book will be outlined a new system of procedure in which the criminal bar will be a preliminary and necessary step to the criminal bench and in this procedure public defense will be an integral and necessary part.

It may be contended that if both prosecution and defense are to be conducted by public officials this opposition between the two sides might as well be abolished and the procedure be conducted by one group of officials who will judge impartially. This would be a return to the procedure of investigation whose underlying theory, as we have seen, is quite in harmony with the principle of social defense. It is true that public prosecution and public defense are both of them social functions and represent the same social interests. But for practical reasons the contradictory feature of the procedure of accusation has been introduced into a procedure based upon a principle similar to that of the procedure of investigation. The practical utility of

this opposition between the prosecution and the defense is well expressed in the following passage from Ferri: "The defense and the accusation must therefore be, the one as much as the other, social functions, entrusted to different functionaries only because it is a cerebral impossibility for the same man in the same process to present equally the proofs for the accusation and those for the defense."¹ Hence so long as the contradictory feature has practical utility this opposition between prosecution and defense should remain in procedure.

There are, however, a few comments and criticisms to be made of the contradictory debate as it exists to-day. The trial of to-day is still too much of a forensic duel in which the principal question is who will win. The true functions of a trial are to reveal evidence and to furnish a practical conclusion. To perform these functions well it is necessary to strengthen those elements in our criminal courts which desire the investigation of truth and not those which are interested in winning a case. We have seen how public defense will tend in this direction by removing a counsel's personal interest in one side of a case, by preventing the development through habit of a bias on one side, and by increasing by means of special training a counsel's ability to appreciate what is significant and true in the evidence. In the following chapter on evidence and also in later chapters on the jury and the judiciary will be discussed further means which will help to bring about this change.

¹ *Op. cit.* p. 524.

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The contradictory debate is useful for the presentation and exposition of evidence, but there is danger of introducing the contradictory element too soon into the process. In the preliminary examination the principal object is the accumulation of evidence and as a rule this can be best accomplished by one impartial person. In this respect the Continental procedure, with its "*juge d'instruction*" who conducts this examination unhampered by the two opposing sides, is superior to the Anglo-American procedure, for in English and American police courts there is a tendency for the contradictory element to creep in and to turn the preliminary examination away from its true function of accumulating evidence.

The contradictory debate is useful for arriving at a practical conclusion, because it furnishes the most effective basis for the formation of conviction. It is hardly possible for a single mind to go over all the data of a case and arrive at a definite conviction when these data are very complex and are not sufficiently complete to afford scientific accuracy, as is the case in most criminal trials. It is, therefore, necessary to have the evidence on each side presented in as striking a manner as possible to the unbiased mind of the judge, in order that he may weigh the evidence quickly and come to a definite decision. So that prosecution and defense will probably remain in criminal procedure for a long time and perhaps always.

CHAPTER IX

EVIDENCE

The subject of central importance in procedure is evidence. The object of a criminal trial is to gather, examine and judge evidence and the study of procedure is the study of the best means by which this can be accomplished. It is, of course, true that the ultimate object of procedure is to defend society against crime. But in order to attain this object of social defense it is necessary to prove certain facts as to the commission of a crime and about the person who has committed it. To arrive at this proof, evidence must be gathered, examined and judged. Consequently the larger part of the mechanism of procedure is devoted to this work.

It will be possible to discuss only briefly the history of evidence. Ferri¹ divides the evolution of proof into five stages. The first stage is the *primitive* stage, when the naive empiricism of personal impressions determined what was proof. The second was the *religious* stage, in which divinity was invoked by means of the ordeal, the judicial duel, etc., to furnish proof. The third was the

¹ E. Ferri: *La sociologie criminelle*, Paris, 1905.

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legal stage, in which the value of different kinds of proof and the quantity necessary for a decision was fixed by law. In this stage, torture was much used in order to secure the confession of guilt of the accused, which was considered the best proof. The present stage is the *sentimental* stage, in which proof is judged by the conscience of the judge or juror, a profound conviction of the truth of one side or the other being the determining motive. The fifth stage, which is just commencing, is the *scientific* stage, in which evidence will be judged according to scientific standards, which have been derived from the exhaustive study of a large amount of data. For the proof of the commission of the criminal act there will be physical, chemical, mechanical, calligraphic, toxicological, etc., proofs while for determining the character of the criminal there will be anthropological, psycho-pathological and sociological proofs. Tarde gives a similar classification of the stages in the evolution of proof, namely, the religious, legal, political, and scientific stages.¹

But these classifications apply more particularly to the evolution of proof in Continental procedures, while the evolution in Anglo-Saxon procedure has been somewhat different, especially in the present stage, which Ferri calls the sentimental and Tarde, the political stage. Anglo-Saxon procedure has developed a very elaborate law of evidence, which is one of its distinguishing features. This body of rules with regard to evidence furnishes

¹ *La philosophie penale*, Paris, 1890.

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some legal determination to proof, so that it is not left entirely to the private conviction of the judge or juror. On account of the higher development of the English law of evidence, it will be necessary to study that first.

A well-known writer on this subject speaks of it as follows: "The system known in practise by the title of 'The Law of Evidence,' began to form about the middle of the seventeenth century—at least this is sufficiently accurate for a general view. The characteristic feature which distinguishes it, both from our own ancient system and those of most other nations, is, that its rules of evidence, both primary and secondary, are in general rules of law; which are not to be enforced or relaxed at the discretion of judges, but are as binding on the court, juries, litigants, and witnesses as the rest of the common law and statute law of the land, and that it is only in the forensic procedure which regulates the manner and order of offering, accepting and rejecting evidence, that a discretionary power, and even that a limited one, is vested in the bench."¹ This indicates the extent to which the private conviction of the judge and juror is limited and restricted by this law of evidence.

But while it may be true that the English law of evidence began to form in the seventeenth century, its origin is much older. "The truth seems to be, that while 'The Law of Evidence' is the creation of comparatively modern times, most of the leading

¹ W. M. Best: *The Principles of the Law of Evidence*, London, 1906, 10th edition, p. 99.

principles on which it is founded have been known and admitted from the earliest."¹ The evolution of the law of evidence has been very slow and has come principally by means of the rulings of judges and not by legislation. "The slow development of the law of evidence, compared with that of the other branches of our jurisprudence, seems a natural consequence of the general principle that in every nation the substantive rules of law arrive at maturity before the adjective."²

The principal cause for the higher development of the law of evidence in the English procedure than in other procedures is the jury. As we shall see in the following chapter, the English jury was originally a body of witnesses who gradually developed into judges of fact. Inasmuch as jurors are comparatively ignorant of law and procedure and are inexperienced in receiving and judging evidence, the judges found it necessary to regulate the kind of witnesses which are to testify before the jury and also to direct its members to a certain extent as to the manner in which they were to judge this testimony. In other words, it was necessary for the judges to protect the jury as much as possible against the mistakes due to its ignorance and inexperience. Out of the many cases in which the judges did so grew a body of more or less uniform rules of evidence. As the independence of the judges increased, these rules became more and more authoritative until they were as binding as

¹ W. M. Best: *Op. cit.* p. 93.

² W. M. Best: *Op. cit.* p. 102.

the common or statute law. The intimate connection between the English law of evidence and the jury will be very evident throughout our study of this subject. The undeveloped state of the law of evidence in Continental procedure is therefore easily accounted for by the absence of the jury until after the French Revolution.

We will now state briefly the fundamental principles of the English law of evidence, which will furnish a basis for a study of the whole subject of evidence.

There are several classifications of the different kinds of evidence. Perhaps the most important is that of *direct* and *indirect*, *inferential*, or *circumstantial* evidence. The first is evidence derived from actual observation or testimony of persons who have a knowledge derived from actual observation. The second is evidence derived by inference from other facts which have been actually observed or are established by testimony. Circumstantial evidence is admissible and may be equally conclusive with direct evidence, but the tendency is to rate circumstantial evidence at a lower value than direct evidence. V

Another classification of evidence is into *material* and *relevant* facts. A material fact is one which, when proved, determines some question in the issue to be considered and decided by the jury. A relevant fact is one from which, when proved, a material fact may be legally inferred. Facts which are neither material nor relevant are excluded from

the consideration of the jury and evidence concerning them is inadmissible.

Facts judicially noticed are certain facts which are presumed by the law to be personally known to the judge and jury. These are classified as political, legal and official facts, public history, natural history, and the vernacular language. The courts take judicial notice of these facts and regard them as established without further proof.

Evidence is classified with regard to its form as *written* and *oral*. Written evidence consists of public and judicial records, deeds, bonds, etc. It is admissible whenever the fact in question is the existence of the document itself or whenever the contents of the document are legally sufficient to establish some material or relevant fact. Oral evidence consists of the *viva voce* testimony of a witness who has been sworn. It is admissible only when the witness can testify from personal knowledge as to the existence or non-existence of some material or relevant fact, or when he is called to give expert testimony.

Evidence with regard to a written document is classified as *primary* and *secondary*. The document itself is primary evidence of its existence and contents. Copies and oral evidence with regard to it are secondary evidence and secondary evidence is inadmissible whenever primary evidence can be produced.

A witness is not allowed to testify to statements made to him or in his presence by other persons. There are a few exceptions to this rule which we

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have not space to state. The exclusion of this kind of evidence called *hearsay* is a distinguishing feature of the English law of evidence.

No evidence against the character of the accused can be given, except in reply to evidence as to his character in his favor which has been introduced first.

The voluntary confession of the accused, when made without fear or hope of favor, is admissible as evidence against him.

Any person, who understands and recognizes the obligations of an oath, is a *competent* witness, unless disqualified by certain circumstances specified by law. Formerly, those who had been convicted of certain infamous crimes and those who had an interest in the case were disqualified, but now these circumstances are regarded as affecting the credibility rather than the competency of a witness.

The *admissibility* of evidence is to be determined by the judge according to the law of evidence or, when the law does not specify, according to his own discretion.

The *sufficiency* and *weight* of evidence are usually determined by the jury. From certain classes of facts, however, the law conclusively infers the existence or non-existence of other facts, and the jury is therefore compelled to find the latter whenever the former have been proved. From certain other classes of facts the law infers, but not conclusively, the existence or non-existence of other facts, and the jury is compelled to find the latter

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only when the former have been proved and when the inference, which the law usually derives therefrom, has not been rebutted. These inferences are called *presumptions* of the law.

The presumption of the law that the accused is innocent until proved to be guilty which has already been discussed in the chapter on criminal law has a good deal of significance for the law of evidence. It results in the principle that guilt must be proved beyond a reasonable doubt and that the evidence must be such as to exclude every reasonable hypothesis but guilt. Furthermore the *corpus delicti* must be established by evidence other than the extrajudicial admissions of the accused.

Leading questions, suggesting the desired answer to the witness, may be employed only in the cross-examination.

The *burden of proof* rests on the affirmative which may be the plaintiff or the defendant according to the nature of the issue.

When a *specific intent* is alleged in the indictment it must be proved as laid.

Formerly the accused could not testify. But for some time past it has been permitted in American procedure and the English "Criminal Evidence Act" of 1898 made it possible in English courts. If, however, the accused offers his testimony the opposing side has the privilege of asking questions regarding his conduct and character which could not otherwise be asked.

This brief summary of the fundamental principles of the English law of evidence gives some idea of its

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character. Its characteristic features have been stated as follows: "The characteristic features of the English common law system of judicial evidence, like those of every other system, are essentially connected with the constitution of the tribunal by which it is administered, and may be stated as consisting of three great principles: 1. The admissibility of evidence is matter of *law*, but the weight or value of evidence is matter of *fact*. 2. Matters of law, including the admissibility of evidence, are proper to be determined by a *fixed*, matters of fact by a *casual*, tribunal; but this is a principle which found little favour with the Court of Chancery, and has gradually become a less integral part of the whole English system. 3. In determining the admissibility of evidence, the production of the best evidence should be exacted."¹

A number of comments upon and criticisms of this law of evidence may be made from the positive point of view, which will prepare the way for an exposition of a scientific system of evidence in the latter part of this chapter.

As we have already noted, the tendency is to rate circumstantial below direct evidence. This tendency has probably grown out of the feeling that it is dangerous to allow jurors to base their conclusions upon inferences drawn from circumstantial evidence. But this does not mean that circumstantial evidence is any less valuable or any less reliable than direct evidence. As a matter of fact, it is sometimes the only evidence and

¹ W. M. Best: *Op. cit.* p. 66.

frequently the best evidence available and it is more reliable than direct evidence because things cannot lie while witnesses frequently do, consciously or unconsciously, as we shall see when studying the psychology of testimony. What is needed is a trained judge who will know the true significance of a piece of circumstantial evidence and will draw the correct inferences therefrom. The juror, inexperienced in these matters, may easily draw the wrong inferences and this prejudice against circumstantial evidence has grown up in his defense. But the juror is liable to similar dangers in receiving direct evidence, for the witness is likely to make mistakes and it is frequently necessary to infer from testimony. Here again is needed the trained judge to estimate, on the basis of a knowledge of the psychology of testimony, the true value of the testimony and to draw the correct inferences therefrom. Furthermore the legitimacy of this distinction between direct and indirect or circumstantial evidence may be questioned.¹ This so-called indirect circumstantial evidence is sometimes the most direct evidence which could be obtained with regard to a crime, for it is a record which the things themselves bear of the act committed, while testimony is at best a second-hand record. At any rate it should be remembered that circumstantial evidence is not necessarily any less valuable than direct evidence, but that on the contrary it is frequently equal to or worth more than direct evidence.

¹ J. F. Stephen: *A General View of the Criminal Law of England*, London, 1890, Ch. XVI.

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Consequently its utility should not be lessened on account of this prejudice. Circumstantial evidence should not be excluded or subordinated to direct evidence, but should be judged by trained judges.

The exclusion of hearsay evidence is one of the distinguishing features of the English law of evidence, since such evidence is very generally admitted in Continental procedure. This exclusion is in accordance with the object of English rules of evidence "to provide that conclusions in judicial cases should be founded on solid grounds."¹ Fraud can be introduced in hearsay evidence and its presence detected with much greater difficulty than in direct or circumstantial evidence. Testimony about persons not parties to the suit can be introduced and their characters blackened gratuitously and frequently unjustly. In French trials witnesses of hearsay evidence are frequently introduced because they can speak well, though their testimony may be worthless or even harmful.² Inexperienced persons easily mistake suspicion for proof and since doubt is always unwelcome there is danger of jumping at conclusions from hearsay evidence. This is the great reason for guarding the jury against hearsay evidence. But notwithstanding all these dangers it is true that very valuable information can be derived from hearsay evidence which cannot be secured in any other way. The question, therefore, may be raised whether with proper restrictions and with trained judges to

¹ J. F. Stephen: *Op. cit.* Ch. XVI.

² Jean Cruppi: *La cour d'assises*, Paris, 1898.

estimate its value, more use cannot be made of hearsay evidence.

The common law has protected very jealously the character of the accused. Until the accused was permitted to testify when he chose to do so it was not possible to introduce any evidence with regard to his character. When the decision depends upon credibility the character of the accused must have a great deal of weight at least with regard to his desire to tell the truth. The question may be raised whether the accused ought not to testify in every case since he is as a rule the best informed witness about the point at issue. If he is innocent his appearance and manner of testifying is frequently the strongest force in his favor. The protection of the character of the accused by the common law was, however, well-founded since in the first part of a trial the point at issue is a fact, namely, the commission of a crime and not the character of the accused though this becomes of great importance if the accused is found guilty. Furthermore the fact that the accused cannot be questioned unless he wishes it stimulates the search for evidence by the prosecution.¹

Rules with regard to the competency of witnesses are to be found in nearly every system of procedure and are intended to guard against the introduction of unreliable testimony. "As the reception of, and credit attached to the statements of witnesses by courts of justice, rest on the natural, if not instinctive, belief which is found to exist in the human

¹ J. F. Stephen: *Op. cit.*

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mind, in the general veracity of human testimony, especially when guarded by the sanction of an oath, it follows that all testimony delivered under that sanction, and perhaps even without it, ought to be heard and believed, unless special reason appears for doubt or disbelief. And here arises a leading distinction which runs through the judicial evidence of this and most other countries; namely, that in some instances the special reason is so obvious that the law deems it safer to reject the testimony of the witness altogether; while in others it allows the witness to make his statement, leaving its truth to be estimated by the tribunal. This is the distinction taken in our books between the *competency* and the *credibility* of witnesses. A witness is said to be *incompetent* to give evidence, when the judge is bound as matter of law to reject his testimony, either generally or on some particular subject; in all other cases it is to be received, and its credibility weighed by the jury.”¹

The presence of the jury in the English procedure has made the rules with regard to the competency of witnesses of great importance. The jury has been guarded against being unduly influenced by unreliable testimony or testimony whose significance is not wholly obvious, by the exclusion of certain classes of witnesses. But the question has been raised whether valuable evidence is not frequently lost on account of this exclusion and whether it would not be better to exclude not the witnesses but certain kinds of testimony which may

¹ W. M. Best: *Op cit.* pp. 124-125.

be offered by them. "Another plan, resorted to by the laws of most nations for guarding against mis-decisions, consists in the repudiation as witnesses of persons whose testimony, either from personal interest in the matter in dispute, or other visible cause, seems likely to prove untrustworthy. This is the *recusatio testis* of the civilians, as distinguished from the *recusatio judicis*, or challenge of the judge, and in our law is called 'The Incompetency of Witnesses.' Its policy, however, has been seriously doubted, even fiercely attacked, in modern times; and much has been said and written on both sides of the question. Perhaps the true view of this matter is that the principle of repudiation should, at least in general, be confined to *pre-appointed* evidence. There is a great difference between the rejection of *evidence* and the rejection of *witnesses*. Evidence may fairly be rejected when it is so remote that, to allow tribunals to act on it, would invest them with dangerous or unconstitutional power; or when being derivative, instead of original, its very production carries the impress of a fraudulent suppression of better evidence; or when its disclosure would be against public policy. But the testimony of casual witnesses to a fact—*i. e.*, of persons who have incidentally witnessed it—comes under none of these heads. Such witnesses are the original depositories of the evidence; and in many cases the exclusion of their testimony would be to exclude all attainable evidence on the question in dispute, and to offer, by impunity, a premium to dishonesty, fraud, and

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crime. If it be said that, owing to personal interest in the matter in question, unsoundness of mind, deficiency of religion, antecedent misconduct, etc., their evidence is likely to prove unsafe, the answer is, that any line drawn on this subject must necessarily be in the highest degree arbitrary. It is impossible to enumerate, *a priori*, the causes which may distort or bias the minds of men to mis-state or pervert the truth, or to estimate the weight of each of these causes in each individual case or with each particular person. But it is very different with *pre-appointed* evidence where parties have the power to select their own witnesses.”¹ Here again, as in connection with circumstantial and hearsay evidence, the need for trained judges is apparent. With such judges it would be possible to admit witnesses and testimony with much greater freedom, trusting to the judges to separate the true from the false. The latter part of the above quotation suggests that there are psychological forces which must be taken into consideration in admitting and judging these forces. This question will be considered in the latter part of this chapter when discussing the psychology of testimony.

The whole question, therefore, as to the competency of witnesses, the admissibility of evidence, and the sufficiency and weight of evidence depends upon the standards to be used in estimating the value of evidence and upon those who are to judge evidence. We have seen what effect the jury has

¹ W. M. Best: *Op. cit.* pp. 52-53.

had upon this question. We shall see what effect other kinds of judges may have.

The presumption of innocence has considerable influence upon evidence. "The English law goes farther in the opposite direction than that of most other countries, for it lays down as a maxim, that it is better several guilty persons should escape than that one innocent person should suffer. The salutary fruit of this is that in no part of the world is genuine voluntary evidence against suspected criminals more easily procured than in England; the persuasion being general throughout society, that if a suspected man be really innocent, the law will take care that no harm shall happen to him."¹ This, of course, constitutes the great utility of this presumption of innocence for the gathering of evidence. "Confidence in the administration of justice must necessarily be shaken when people reflect, and can truly reflect, that every individual they see condemned to punishment may be in the highest degree unfortunate, and in no degree guilty, his sufferings being inflicted merely as a sacrifice to a supposed expediency. Under such a system, few would care to prosecute for offences, still fewer to come forward with voluntary testimony against persons accused or suspected of them."²

But such a presumption does not exist in Continental procedure and the question may be raised whether there is not danger of carrying it so far as to hamper the defense of society. It may be

¹ W. M. Best: *Op. cit.* pp. 33-34.

² W. M. Best: *Op. cit.* pp. 34-35.

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possible to increase the possibility of convicting the guilty without at the same time lessening the protection against conviction for the innocent. This might be accomplished by limiting the presumption of innocence to the preliminary examination, after which there should be no presumption on either side but only the earnest endeavor to determine the truth by every possible means. "The presumption of innocence, and with it the more general rule—*in dubio pro reo*—certainly has a foundation of truth and is even obligatory, when the period preparatory to the trial is concerned, that is to say, the preliminary examination, and when there are as yet only suppositions against the one who is the object of the examination."¹ But after the preliminary examination this presumption should have little or no weight, especially in certain cases. "It must, therefore, be given weight only with regard to what concerns the material proof of the crime, that is to say, with regard to the physical responsibility of the accused, who denies that he is the author of the incriminating act. But when concerned with a flagrant crime or with a confession, which has been confirmed in other ways, of the accused, this presumption, which is exclusively in his favor, does not seem to me to have the same logical or juridical force. It has still less, for example, when the accused is not an occasional criminal, who succumbs for the first time, or the supposed author of an occasional misdeed, which, to speak with more precision, belongs

¹ E. Ferri: *Op. cit.* pp. 493-494.

to the cases of evolutive delinquency, but that he is on the contrary a recidivist, a professional criminal, or that his misdeed in itself, in its motives and in its circumstances, reveals a born or insane criminal, and, to be more precise, the author of a form of atavistic criminality.”¹ If more of the spirit of the procedure of investigation could be infused into the trial, then this presumption, which was developed by the procedure of accusation and was especially needed when the state assumed the function of prosecuting, could be dispensed with very easily.

Leading questions are forbidden in the first examination by the law of evidence, because they tend to suggest to the witness the answer desired by the questioner. A psychological study of this subject shows that their utility depends upon the character of the witness and the subject will be more fully discussed when dealing with the psychology of testimony.

A plea of guilty is in English law equivalent to a conviction. “If the accused confesses himself guilty, the confession is recorded and the court in its discretion proceeds to judgment. Such a confession of guilt is in law a conviction.”² Such is not the case, however, in Continental procedure where further evidence is needed to corroborate a confession of guilt before the accused is convicted. In other words, the confession is a part of the

¹ E. Ferri: *Op. cit.* p. 494.

² E. B. Bowen-Rowlands: *Criminal Proceedings on Indictment and Information in England and Wales*, London, 1904.

evidence and is not equivalent to a conviction. It goes without saying that such a confession is very powerful evidence and as it results in a cessation on the part of the defense of any attempt to prove the innocence of the accused the trial is greatly shortened. But as insanity, the desire to protect the guilty person, or some such reason may sometimes lead to the confession of guilt by an innocent person, it is scarcely safe to consider such a confession as equivalent to a conviction.

No burden of proof exists in Continental procedure and it is not needed if there is every legitimate guarantee of a protection to the innocent. As in every argument and debate it is of course necessary for the affirmative to take the initiative, but to make of this formality a rule of evidence is to impose an unnecessary restriction upon the freedom of the debate.

This study of these rules of evidence has revealed a certain amount of arbitrariness and rigidity which is to a certain extent inevitable in any law of evidence. As we have seen, the presence of the jury has emphasized these characteristics in the English law of evidence. But it is true in receiving and weighing evidence as in the treatment of criminals, that individualization is necessary, since each individual case and witness is more or less peculiar. Therefore, a law of evidence should be very flexible. To have this flexibility it must be based on scientific principles. But before taking up the study of these scientific principles it will

be necessary to consider the ways in which evidence is now gathered and presented.

As most criminal cases are commenced by an arrest, the first evidence is gathered by the police, in ways which have already been discussed in our chapter on the police agency. This evidence is presented at the preliminary examination, which is held in England and America before a police magistrate, in France before a *juge de la paix* or before a *juge d'instruction* and in other Continental countries before similar officials. In the case of certain minor offenses these judges have the power to try and decide a case except the *juge d'instruction* who has not this power though he has a great deal of power in examining and determining whether or not a case shall be dismissed and to what tribunal it is to be sent. Outside of these cases where the examining magistrate has the power of summary jurisdiction, the object of the preliminary examination is to determine whether there is sufficient reason for detaining the accused and to what tribunal his case should be sent. The evidence presented in the preliminary examination is repeated in the final trial, for which reason in English and American police-courts there is not much care taken to keep a record of the evidence and the evidence is not as full and explicit as it might be. This is, however, a mistake since the preliminary examination ought to be very complete in order to lose no evidence. There is considerable difference between the preliminary examination of Anglo-American procedure and that of Continental

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procedure in this and other respects and we will make a comparison of the two, taking the French as an example of Continental procedure.

The Anglo-American preliminary examination is held in public. It is to a certain extent contradictory, since counsel for the prosecution and for the defense can take part and frequently do so. When such is the case a good deal of time may be spent on one case, because of the argument between counsel. Otherwise very little time is given to each case, since no attempt is made to gather and record all the testimony. The only object is for the judge to determine whether there is sufficient reason to hold the accused for trial. The publicity of this preliminary examination and the possibility of making it contradictory reveal its origin in the procedure of accusation.

The examination before the *juge d'instruction* or French examining magistrate is secret. No public prosecutor is present. Counsel for the defense is admitted. He has no right to take part formally in the examination, but protects his client against any abusive use of his power by the *juge d'instruction*. The counsel can, however, usually influence the examination a little by informal conversation with the judge. The judge carefully examines the plaintiff, the defendant and the witnesses, writing a concise statement of the testimony in the case of each person examined. He then decides to what court the case should be sent for trial or dismisses it if there is not sufficient evidence against

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the accused to justify detaining him by means of an "*ordonnance de non lieu*."

It is evident that the French preliminary examination originated from and is in the spirit of the procedure of investigation. When we compare with it the Anglo-American preliminary examination we can see its superiority. It must be remembered that this examination is not final. It is only for the purpose of determining if there is sufficient reason for detaining the accused for trial and also should be for the purpose of gathering all the available evidence. There is, therefore, no occasion for making it contradictory as it frequently is in the Anglo-American procedure. It is well to admit the counsel for the defense in order to guard carefully the rights and interests of the accused, but the public prosecutor should be excluded since there is no reason for introducing the contradictory element at this stage in the procedure. Publicity is, therefore, not absolutely necessary. Secrecy is probably more advisable since more spontaneous testimony can be obtained under these conditions from witnesses who have heard no contradictory testimony. The same reasons for publicity do not exist which will be discussed further on in connection with the examination in the trial. If, however, there is any reason to believe that publicity will make the evidence more reliable, the examination can be made public. Garofalo has formulated this principle as follows: "It (the preliminary examination) will be secret, at least when the *juge d'instruction* thinks that publicity will not help the

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search for truth. In that case he will be able to admit the contradiction of the parties and of the witnesses, but without the presence of lawyers.”¹ It is well, as we have already noted, to admit the counsel for the defense, but the absence of the public prosecutor will exclude any contradictory element from the procedure. The presence of opposing parties and witnesses frequently acts as a check on each other's testimony and a *juge d'instruction*, having the power to do so, will sometimes examine one of the parties or a witness in the presence of the opposing party or another witness.

The success of the preliminary examination must depend largely upon the character of the examining magistrate and the powers given to him. The *juge d'instruction* is a descendant of the Grand Inquisitor and his functions are a survival of the Inquisition.² His powers have been too great and may be so still, as, for example, his power to detain an accused for six months. His powers were, however, restricted by the law of 1897 and the presence of the counsel for the defense is an effective check upon him. It must furthermore be remembered that the *juge d'instruction* performs the functions of the grand jury as well as those of the English or American examining magistrate, for which reason his powers are somewhat enlarged. The *chambre des mises en accusation* is sometimes spoken of as corresponding to the grand jury but

¹ *La criminologie*, 5th edition, Paris, 1905, p. 468.

² Cf. Oliver E. Bodington: *An Outline of the French Law of Evidence*, London, 1904.

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this is not accurate since the *chambre* is a professional body made up of magistrates and hears no testimony. It decides only upon points of law involved in the record of the examination made by the *juge d'instruction*. It is not necessary to discuss the examination made by the grand jury in this chapter, since no record is kept of it.

But it is not sufficient that the powers of the examining magistrate should be properly limited and that he should be entirely unbiased in conducting the examination. He should also be competent to gather all the available evidence. He should understand the psychology of witnesses so as to obtain the largest possible amount of testimony from them. He should be able to go to the scene of the crime, as is now done by the *juge d'instruction*, and, with or without the aid of experts, to gather the physical, chemical, toxicological, etc., evidences of crime. As a preparation for this work, he should be trained in criminal anthropology and sociology. It is evident that the examining magistrate must be a man of special training. The method of preparing him for his work will be discussed in a later chapter on the judiciary. A careful record of this examination should be kept, as is now done by the *juge d'instruction*, though a mistaken use is made of this record, as will be seen further on. Such a record would preserve evidence which may disappear or become less reliable before the time for the trial arrives.

This, then, is the kind of an examination necessary, in the first place, to arrive at a wise decision

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as to whether or not the accused should be held for trial, and, in the second place, for securing a record of all the available evidence. An English or American police court is, however, quite unfitted for conducting such an examination. The magistrate has no special training for his task. The time given to each case is usually too short to permit of a thorough investigation and the publicity is excessive. The Anglo-American preliminary examination is, therefore, very inefficient and is indeed a disgrace to English and American systems of procedure, for it very greatly lessens their effectiveness for administering justice. The French preliminary examination, on the contrary, notwithstanding its faults, furnishes a basis for reconstruction.

After the preliminary examination, the gathering of evidence is left to the prosecution and defense, each party gathering the evidence for its own side. This is an effective way of having the evidence gathered, since it is to the interest of each side to produce the largest possible amount of evidence in its own behalf. It is, however, essential that the advocates should have the special training which will enable them to know what is evidence and to estimate its value. The question of the training of advocates will be taken up in the chapter on the judiciary.

We now come to the examination in the trial which must be essentially different from the preliminary examination, since the object now is to reach a final decision. We will again compare the Continental procedure as exemplified in the French,

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with the English and American procedure, with respect to this examination. As indicated above, the evidence is gathered and the witnesses summoned by the prosecution and the defense. But the method in which the evidence is presented varies greatly. In Continental procedure the judges assist greatly in presenting the evidence by conducting the examination of witnesses as in the preliminary examination. The witness is supposed to give his testimony spontaneously but most of it is drawn out by questions from the judge. This characteristic of Continental procedure is derived from the old inquisitorial procedure. Furthermore, in most Continental countries, as, for example, in France and in Germany, the judge has already studied the record of the preliminary examination which has tended to give him an opinion favorable to one side or the other, more frequently against the defendant since the weight of the evidence in the preliminary examination is usually against the defendant. Since it is very difficult for any one to remain absolutely impartial while presenting evidence on two sides, this prejudice tends to increase and leads the judge to bring out more emphatically the evidence on one side, usually against the defendant.

The examination in an English or American trial is quite different and reveals its origin in the procedure of accusation. The examination is conducted by the counsel for the two sides. The judge knows nothing of the evidence previous to the trial and has little to do with the examination, except to decide questions as to the law of evidence and on

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rare occasions to ask a question of a witness. First comes the examination-in-chief or direct examination in which the object of the counsel for the side which has called the witness is to make the witness tell what he knows consecutively and without wandering from the point. Skill is required to ask questions so as to accomplish this without suggesting answers since leading questions are not permitted. Then comes the cross-examination in which the counsel for the opposite side tries to shake the evidence given and to bring out any facts favorable for his side. Leading questions may be asked in the cross-examination. In the re-direct examination the counsel for the side which has called the witness tries to clear up any point brought out in the cross-examination which needs explanation.

When we compare this method of examination with the French method there can be no question that the Anglo-American method is superior. The tendency of a French judge is to become prejudiced against the defendant and to throw the weight of the evidence against him. This is indicated by the aggressive manner in which the "*president*" or presiding judge in a French court will usually put the questions to a witness and especially to a witness in favor of the defendant. He interferes continually in the debate and has frequent conflicts with the accused and the witnesses, after which he cannot judge impartially.¹ It is probably this characteristic of a French trial which has given

¹ Jean Cruppi: *La cour d'assises*, Paris, 1898.

rise to the popular impression that in French procedure a defendant is presumed to be guilty until he has proved himself innocent. This is, of course, not true in theory though it tends to become true in practise. This fact has been expressed as follows by a writer on the French law of evidence: "It is unfair to say that in France a prisoner is guilty until he has been proved to be innocent; but it is true to say that the French system fosters prejudice against the prisoner."¹

The English or American judge, on the contrary, is able to maintain an unbiased attitude throughout the trial. He comes to the examination with a fresh and open mind and remains passive while the evidence and arguments of both sides are being presented before him. He is then able to weigh these impartially and to come to the wisest decision possible under the circumstances.

The Anglo-American examination is preferable also because it exposes a larger amount of evidence. It is a psychological impossibility for one man to keep in mind all the points on both sides of a more or less complicated controversy. In the English or American examination, on the contrary, there are two minds each interested in bringing out every possible point on its own side and, furthermore, interested in bringing out by means of the cross-examination every inconsistency and fallacy in the evidence or arguments of the other side. The anticipation of the cross-examination frequently influences the direct examination by the

¹ O. E. Bodington: *Op. cit.* p. 105.

fear it excites which prevents many attempts to impose upon the court. An English writer has well stated the advantages of this form of examination in the following words: "But of all checks on the mendacity and misrepresentations of witnesses, the most effective is the requiring their evidence to be given *viva voce*, in presence of the party against whom they are produced, who is allowed to cross-examine them; *i. e.*, to ask them such questions as he thinks may serve his cause. The great tests of the truth of any narrative are the consistency of its several parts, and the possibility and probability of the matters narrated. Stories false in toto are comparatively rare; it is by misrepresentation, suppression of some matters and addition of others, that a false coloring is given to things; and it is only by a searching inquiry into the surrounding circumstances that the whole truth can be brought to light. Now, although much valuable evidence is often elicited by questions put from the tribunal, and although the story told by a witness frequently discloses, of itself, some inconsistency or improbability fatal to the whole, it is chiefly from the party against whom false testimony is directed, that we can expect to obtain the most efficient materials for its detection. He, above all others, is interested in exposing it, and is the person best acquainted, often the only person acquainted with the facts as they have really occurred. Besides, as the answer to one question frequently suggests another, it is extremely difficult for a mendacious witness to come prepared

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with his story, ready fitted to meet any question which may be thus put to him on a sudden."¹

We see from the above quotation the utility of publicity as a check to mendacity on the part of witnesses. It serves also as a check to corruption and as a stimulus to the attention of judges who know that the public is watching them in the performance of their duties.

From their training in cross-examination English and American lawyers have acquired an inquisitorial ability as great as that of the judge inquisitors of the old French procedure.² This ability is very effective frequently in exposing errors in testimony. But it is also used to confuse witnesses in order to bring discredit upon their testimony. And lawyers frequently succeed in doing so on account of the presence of the jury whereas they rarely succeed in deceiving judges.

By comparing the examination in the two procedures the differences between the English and the French law of evidence are made very evident. In a French trial the question of relevancy is rarely ever raised, because "hearsay evidence," opinion, or evidence as to character are not excluded. Counsel introduces all oral or documentary evidence which he believes will throw light on the case. Witnesses narrate uninterruptedly, with only occasional questions from judge or counsel to elucidate particular points. The judges are expected to separate the

¹ W. M. Best: *Op. cit.* pp. 84-85.

² Cf. A. Esmein: *Le "Criminal Evidence Act" de 1898 et le serment des accusés en Angleterre*, Paris, 1898.

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wheat from the chaff in the evidence. There is an economy of time in this system, since there is no lengthy direct and cross-examination. This system is not bad where the decision is made by a judge for a trained judge is capable of distinguishing the relevant and significant facts in the evidence. But it is very bad for a jury which is likely to be influenced by unimportant testimony. This, as we have seen, has been the principal cause for the development of the English law of evidence.

After the examination and contradictory debate comes the charge to the jury by the judge. "*The charge of the court to the jury consists of an explanation of the law governing the case, and of such a review of the evidence as may be necessary in connection therewith.*"¹ This charge to the jury was carried to the Continent with the jury after the French Revolution. But it was found that it was the tendency of the judge to influence the jury usually against the accused, though sometimes this effort on the part of the judge resulted in antagonizing the jury and sending it too far in the other direction. This tendency of the judge was the result of the prejudice against the accused which we have already discussed. As a consequence the charge to the jury has been abolished in France and in other Continental countries. The underlying principle of this charge is that the judge is not to influence the jury. And yet if the judge reviews the evidence carefully, he can scarcely avoid

¹ Wm. C. Robinson: *Elementary Law*, Boston, 1882, pp. 330-331

showing his opinion. So that the English or American judge is as likely to influence the jury as the Continental judge. But though this is as great a violation of the principle stated above it is not so objectionable as in the case of the Continental judge because, as we have seen, the opinion of the English or American judge is likely to be more impartial. In fact it is probably better on the whole that this principle should be violated since the jury is usually in need of just such guidance as the judge can give to it.

After the charge to the jury comes the decision. Since this is the function of the judge or of the jury it will be discussed in the following chapters on the jury and the judiciary.

We have now reviewed the law of evidence and the methods used to gather and present evidence in existing systems of procedure. With this as a starting point let us consider the scientific principles which underlie evidence and outline a system of evidence based on these principles.

In the past, belief has existed in the possibility and also in the necessity of having absolute legal proof of guilt.¹ This was perhaps the principal cause for the use of torture in the past to extort a confession of guilt from the accused. There was also a moral and religious element involved in this belief, for it was considered necessary to have absolute proof not only of the commission of the crime but also of the moral guilt of the criminal. "It has been thought, and it seems quite probable, that this

¹ G. Tarde: *Op. cit.*

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idea of responsibility was one of the pretexts, not the only one certainly, for that whole question is very complex, and there were others, well known, and absolutely predominant, which excused the introduction of torture. In order to punish, it was necessary to have proof, not only of the deed, but of guilt. It was, therefore, necessary to provoke a confession; and as in general guilty persons do not confess freely or at least they exonerate themselves, it was by torture that it was sought to establish their guilt, as much moral as material.”¹ A reminiscence of this belief in the possibility of absolute legal proof still lingers in the idea that confession is the “queen of proofs” and that a plea of guilty is conclusive evidence of guilt.

But it is now pretty generally recognized that legal proof is relative like all other forms of proof, and that legal evidence is the same as the evidence of science and of common sense. We find recognition of this truth in the eighteenth century in the writings of Beccaria: “The word probability, in connection with crimes, which, to merit punishment, must be certain, will perhaps appear misplaced, but this will cease to be a sort of a paradox for whoever will consider that, strictly speaking, moral certitude is only a probability, of such a kind, however that it merits the name of certitude, because every man of good sense sees himself forced to give to it his assent by a sort of habit born of the very necessity to act, and anterior to all

¹ R. Saleilles: *L'individualisation de la peine*, Paris, 1898. p. 39.

speculation. But the certitude requisite to convict a guilty person is the same which determines men in the most important operations of life."¹ This truth is stated also in the following quotations from two well-known English legal writers of the nineteenth century:

"Facts which come in question in courts of justice are inquired into and determined in precisely the same way, as doubtful or disputed facts are inquired into and determined by mankind in general, except so far as positive law has interposed with artificial rules, to secure impartiality and accuracy of decision, or exclude collateral mischiefs likely to result from the investigation."²

"All inquiries into assertions as to matters of fact rest upon the same foundations as assertions about physical science. At bottom they rest upon the same great assumptions—the general uniformity of Nature, and the general trustworthiness of the senses. The logic on which each proceeds is the same. In each case certain conclusions are drawn from certain facts, and in each case it is easy to err, either because any given premiss is false, or any given conclusion is incorrect. The certainty of the conclusions reached in each is proportional to the strength of the evidence."³

Thus a high degree of probability is the best possible result of judicial evidence as it is of scientific evidence. But the degree of probability is usually

¹ C. Beccaria: *Crimes and Punishments*, Chap. XIV.

² W. M. Best: *Op. cit.* p. 2.

³ J. F. Stephen: *Op. cit.* p. 189.

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lower in law than in science on account of certain differences in the practical conditions under which the search for proof is made. Stephen has given five such differences: (1) In science, the number of relevant facts is unlimited; in law, it is limited. (2) In science, inquiries can be prolonged and conclusions can be revised indefinitely; in judicial investigations, the time is limited and conclusions cannot usually be revised. (3) In science, facts are usually open to no doubt, because they do not concern the passions and because they are observed by trained observers who are exposed to criticism and correction if they make mistakes and who are not tempted to commit fraud. In judicial inquiries, facts affect the passions and are testified to by untrained observers who usually cannot be contradicted and are strongly tempted to misrepresent. (4) Approximate generalizations are more useful in law than in science because individual experience supplies qualifications and exceptions to adjust general rules to particular facts; but this is not the case in scientific inquiries. (5) In judicial inquiries, the best possible conclusion is reached more easily than in science but without as much certainty.¹

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On account of the above differences and because in law it is necessary to reach a practical conclusion in a limited period of time the same precision cannot be attained in law in the methods used and in the results obtained as in science. But the object should be to make these methods as scientific

¹ J. F. Stephen: *Op. cit.*

as possible in order that the results shall approximate as closely as possible those of science. We shall, therefore, now discuss the different kinds of evidence and the methods of weighing the value of evidence in order to determine how far the classification of evidence and the weighing of its value can be made scientific. Scientific methods have already been applied to a certain extent in medical jurisprudence and in the use of expert testimony and we will commence with a review of the present status of medical jurisprudence and of the ways in which expert testimony is used.

The Romans exonerated certain of the sick from punishment as being morally irresponsible and this immunity lasted through the Middle Ages though the insane were frequently punished as being possessed by the devil.¹ This fact shows that it has been recognized for a long time that the physical condition of a criminal had some effect upon his responsibility. Tarde says that legal medicine or medical jurisprudence began in the thirteenth century.² But we cannot stop to trace its historical development in this book.

Medical jurisprudence requires testimony of various kinds from medico-legal experts. General information about the human body is frequently needed. It is frequently necessary to examine cadavers and victims of attacks against the person such as wounds by firearms or other weapons, strangulation, precipitation from an elevation, asphyxiation,

¹ Cf. Ch. Fere: *Dégénérescence et criminalité*, Paris, 1888.

² *Op. cit.*

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poisoning, etc. The sexual instinct and function of reproduction call for medico-legal experts for the examination of victims of rape, pederasty, sodomy, etc., of women who are pregnant or have given birth to children and in cases of criminal abortion. Infanticide necessitates the autopsy of newborn infants. Closely connected with this sort of testimony is that of observers with the microscope who examine traces of blood or of sperm, excrements, hairs, imprints of hands or of feet, etc.

Another important function of medico-legal experts is to examine accused persons and to give testimony with regard to certain diseases such as epilepsy, insanity, etc., which may cause irresponsibility. The most frequent cause of irresponsibility is insanity. The procedure in such cases varies greatly under different jurisdictions as indicated in the following quotation about the States of the Union: "Whenever a plea of insanity is made at the beginning of a trial, the obligation to take account of this plea is everywhere recognized, but the methods of respecting the plea and determining the question of insanity are different. In some States the trial is suspended until the question of insanity is determined. In others the trial is proceeded with in regular course but the jury take account of the plea of insanity in rendering their verdict. Thus in some States the matter of insanity is decided before the question whether or not the person committed the crime for which he is charged. In some States a special jury is impaneled to decide the question of

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insanity. In other States it is determined by a special commission of experts appointed by the judge."¹ The importance of having medical testimony in such cases can hardly be questioned since no judge or jury can be expected to have any special knowledge of this disease: "Though no method can insure infallibility of judgment in regard to the insanity of a person, the importance of competent medical testimony does not need to be argued. From Indiana we learn that cases have been known in which persons charged with crime have been acquitted by a jury on the ground of insanity and have subsequently been held sane by a commission of lunacy. In Florida the question of insanity is not committed to a jury, but decided by experts."²

The practical questions to-day are how a medico-legal expert is to testify and what influence his testimony is to have upon the decision. As a rule a medico-legal expert is required to answer yes or no to the question whether or not the accused is insane. "The law and the judge demand of the medico-legal expert a description of the defendant by means of a monosyllabic response, in declaring by a yes or by a no whether he is insane or healthy of mind, because they believe that living nature can be imprisoned in their dilemmas or their juridical syllogisms. Very often, on the contrary, all that the expert can reply is that the defendant is between insanity and health of mind, or insanity and

¹ S. J. Barrows: *The Criminal Insane in the United States and in Foreign Countries*, Washington, 1898, pp. 8-9.

² S. J. Barrows: *Op. cit.* p. 9.

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congenital criminality, etc.”¹ An absolute distinction can be drawn between insanity and sanity no more than it can be drawn between a disease of any other part of the body and a healthy condition of that part. There are degrees in the extent to which the mind can be diseased and a variety of ways in which it may be diseased as indicated in the following quotation: “To-day the medico-legal expert very often declares irresponsibility on account of moral anomalies or of nervous troubles which have an influence upon the temperament or character rather than upon the intelligence of the accused. They have gone further and have found a cause for the exclusion of responsibility in the sway of a passion; in suggestion (not that of hypnotism, but the suggestion exercised upon a feeble mind); or, again, in the obsession produced by an idea which has taken possession of a brain, although the obsessed person does not present any symptom of delirium; or finally, in the lack of a moral sense, or the moral inferiority of certain delinquents who consequently have no other rule, no other *criterion* of conduct than their egoistic interest, without any repugnance for cruel or unjust acts.”² Thus it is essential that the medico-legal expert shall be free to diagnose the condition of the accused as he would in any other case and not be forced to give a categorical answer.

Closely connected with this form of answer has

¹ E. Ferri: *Op. cit.* p. 172.

² R. Garofalo: in the *Archives d'anthropologie criminelle*, June, 1906.

been the question of responsibility. A categorical answer has been required because upon it has usually depended the decision of the judge or jury as to the responsibility of the accused. But this has been a simple and naïve conception of the situation. It has been a failure to recognize that the responsibility must vary not only according to the degree and character of the disease but also according to certain psychological and social considerations. Thus the medico-legal expert while testifying about a purely medical matter is also deciding a question which is in part psychological and social. As Saleilles has put one phase of it, the doctor is called upon "to pronounce, no more upon what is in his province, the existence of a mental malady, but upon a psychological question, the relation of this morbid state to the existence or the degree of legal responsibility; or again, supposing, as will be the case ordinarily, that the doctor has given his conclusions upon this very question of the responsibility, it will be the judge, invested with the right to pass beyond and to judge in his turn the judgment of the doctor, who will reform it and will decide upon other bases a question of psychology, which nevertheless depends upon a state of pathological morbidity. It is a confusion of all the rôles."¹

The answer, therefore, to the first question, as to how a medico-legal expert is to testify, is that he should be permitted to diagnose the condition of the accused as he would in any other case. We

¹ *Op. cit.* p. 74.

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must now consider the second question as to the influence his testimony is to have upon the decision. As we have seen, his testimony which is purely medical has very frequently in practise an influence upon the decision of a question which is partly psychological and social. This is manifestly wrong. But within a purely medical sphere his influence might be greatly increased. To-day the question as to whether or not a person accused of crime is insane is frequently decided by a judge or jury. This is manifestly absurd since a judge or jury can have no special knowledge of insanity or any other disease. And yet it has been defended by a distinguished English jurist in the following words: "It is impossible to say what an expert is to be if he is not to be a witness like other witnesses. If he is to decide upon medical or other scientific questions connected with the case so as to bind either the judge or the jury, the inevitable result is a divided responsibility which would destroy the whole value of the trial. If the expert is to tell the jury what is the law say about madness—he supersedes the judge. If he is to decide whether in fact the prisoner is mad, he supersedes the jury. If he is only to advise the court, is he or is he not to do so publicly and to be liable to cross-examination?"¹ Throughout this quotation it is implied that expert testimony is to be contradictory, which is a subject we shall discuss further on. The expert will, of course, not supersede the judge in

¹J. F. Stephen: *A History of the Criminal Law of England*, London, 1833, Vol. I, p. 575.

expounding the law unless the law pretends to define madness. But he certainly should supersede the jury in deciding whether or not a prisoner is mad, because a jury is quite incompetent to judge such a question. And this will by no means divide the responsibility for the final decision because this decision of the expert will only furnish one of the necessary data upon which the final decision is to be based.

Therefore the question as to whether a defendant is diseased and if so as to the character and degree of his disease, whether it be insanity, epilepsy, susceptibility to suggestion or any other disease should be left entirely to an expert or to a commission or jury of experts. Ferri has shown why this power has been given to judges and juries in the following words: "This pretension born of this widespread prejudice, the effect of the old spiritualistic ideas and sustained by Kant himself, that the judging of 'diseases of the mind' belongs to the philosopher rather than to the doctor, is nourished by preoccupation with social defense; because it is thought that to admit infirmity of mind and to exclude moral liberty is to put the dangerous criminal at liberty. But this preoccupation would disappear, when once has been substituted, as we demand, the foundation of social responsibility for that of moral liberty."¹

It is probable that the medical profession itself has not done enough to change this antiquated conception of responsibility. "There has been a

¹ *Op. cit.* pp. 522-523.

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regrettable tendency on the part of the medical profession to accept the conception of responsibility and to endeavor to fit it into harmony with the medical facts. Such an attempt is foredoomed to failure and can only lead to endless futilities and absurdities. The idea of responsibility is an antique metaphysico-juridical conception which has done good service in its time, but it belongs to the lawyer's province, not the doctor's; it is the lawyer's business to bring it into line with the facts, and doctors have been misguided, though with the best and most humane of motives, in endeavoring to bring it into harmony with the data of their own science."¹

But while the medico-legal expert should have the power of deciding what is the pathological condition of the defendant it is not necessary that he should make the final decision in any case. As has already been stated psychological and social considerations must be taken into account as well as medical. While the medico-legal expert should have the function of proving certain facts these facts should be weighed and judged in their relation to other facts by a judge who has had an anthropological, psychological and sociological training. The limitations upon the functions of the medico-legal expert are recognized by a French neurologist in the following passage: "It will be noticed how much from this point of view the rôle of the experts is different from that of the judges (magistrates or jurors). For the judges the problem of

¹ Havelock Ellis: *The Criminal*

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responsibility is much more complex; it presents itself in all its generality. Thus the judge must take special notice of the *intention* (which is an element of moral responsibility). The case of legitimate defense, for example, which will excuse certain unlawful and criminal acts for the judge must not be taken into consideration by the doctor. Generally speaking, the circumstances of the deed, foreign to the person who committed it, so important in the examination and for the judgment, are nothing for the doctor. He has to consider in the circumstances only what can enlighten him as to the person himself, as to the state of his nervous system. The doctor starts out from the deed materially established and tries to find out by psycho-pathological analysis of the person if this person has determined upon this act with a nervous system intact, with healthy or diseased nervous centers. The question presented to jurors upon the *guilt* of a person is entirely different from the question presented to experts upon the *responsibility*. One can be entirely responsible of an act of which one is not guilty. A juror can acquit a person declared responsible by the doctor, without there being any contradiction between the two verdicts; but a juror ought not to be able to condemn a person whom the doctor declares irresponsible; *physiological responsibility is a necessary but not sufficient element of guilt*. This shows incidentally what would be the error of those who would like to make the whole examination medical

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expert testimony and to replace the judges with doctors."¹

Certain criticisms might be made of the conception of penal responsibility revealed in this citation but the citation shows the complexity of the elements which enter into a decision and which a medico-legal expert as such could not judge wisely. It requires on the contrary a judge capable of comprehending all the considerations involved and of weighing and judging them impartially.

Having considered how the medico-legal expert is to testify and what weight his testimony is to have it is now necessary to consider the personnel of the medico-legal experts. They are usually doctors without any special training. Some of the mistakes they make are due to the fact that the science of legal medicine is not yet fully developed. But others are due to their lack of a special knowledge which would prevent them from making mistakes of omission by failing to note certain data and mistakes of commission by mistaking the significance of other data.² Special courses in legal medicine have been established at the medical schools at Lyons and Paris in France, at Lausanne in Switzerland and elsewhere in Europe. In addition to this training in the schools there should be clinics in prisons, insane asylums and morgues.

Closely connected with the question of the personnel of the medico-legal experts is that of their

¹ J. Grasset: *Demifous et demiresponsables*, Paris, 1907, pp. 222-223.

² A. Lacassagne: in the *Archives d'anthropologie criminelle*, Lyons, 1897.

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relation towards other branches of procedure. The usual custom is for each side to summon medico-legal experts. These experts are, of course, expected to look for the truth only and to give unbiased testimony. But it is natural and almost inevitable that an expert should be influenced by the side which has called him since his desire is to please it in order to be called again and earn the fees. When, therefore, there is any doubt an expert can very easily decide for his own side. Thus a public prosecutor will keep on hand experts who will always or nearly always testify against insanity. These experts are, therefore, prosecutors like the public prosecutor himself. This fact is recognized by Stephen, who defends contradictory expert testimony: "There have been, no doubt, and there still occasionally are, scenes between medical witnesses and the counsel who cross-examine them which are not creditable, but the reason is that medical witnesses in such cases are not really witnesses but counsel in disguise who have come to support the side by which they are called."¹ In like manner the defense secures experts to oppose and contradict the opinion of the experts for the prosecution and these experts are in reality counsel for the defense.

This contradictory system of expert testimony has probably grown out of the fact that experts do not always agree. It has, therefore, been considered necessary to have a variety of expert opinions presented and then to have the decision made by

¹ J. F. Stephen: *Op. cit.* p. 576.

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some one else. But because experts who know something about the question at issue do not always agree and are likely to make mistakes sometimes is no reason for leaving the decision to lawyers and jurors who know nothing about it. As Ellis has put it: "Experts will often differ as lawyers often differ, but the lawyer is not more competent to decide on the science of the expert than the expert is competent to decide on the law of the lawyer. It is not for the interests of justice that one expert, representing perhaps only his own opinion, should weigh against another representing perhaps the general body of scientific opinion on that subject. It is not calculated for the ends of justice that the judge, however quick and intelligent, should have to pronounce on matters concerning which he can only speak as a layman, and necessarily falls into frequent errors of judgment."¹

As we have already seen, the decision of these medical questions should be left to the medico-legal expert. His rôle is an entirely impartial one, that of examining the facts and judging them like a judge. Hence to make expert testimony contradictory is to make the judgment contradictory, which is a contradiction in terms.²

Under the existing system a number of ways might be suggested of choosing experts which would make them non-partisan. Since the functions of experts are like those of judges they might

¹ Havelock Ellis: *Op. cit.*

² Dr. Victor Parant: *La designation contradictoire des experts devant les tribunaux*, in the *Revue pénitentiaire*, Paris, March, 1907.

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be chosen like jurors from a list prepared beforehand, the right of challenging being given to both sides. Or the two sides could choose in concurrence from this list. When a specialist not on the list is needed he could be designated by the judge while each side would have the right to challenge.¹

But better still would be the organization of a system of medical jurisprudence. Such a system has already been partially developed in Germany. In each province there is a college of experts to which appeal can be made from the decision of an expert at a court of first instance. At the capital there is a scientific deputation which acts as a court of final appeal.² To have a regular judicial organization there should be one or more professional experts attached to each court. There should be courts of appeal made up of the ablest experts. Then if there was a difference of opinion among experts or the decision in a certain case was contested the question at issue could be referred to this court of appeal for decision. The need for such courts of appeal and a supreme medico-legal tribunal is insisted upon by Ellis. "Special points involving special knowledge or skill must be submitted to a commission of experts, and the verdicts of the commission on these special points must be accepted by the court, though subject to an appeal to a supreme medico-legal tribunal. Some such method as this is now being widely demanded by intelligent opinion in the interests of justice."³

¹ Dr. Victor Parant: *Op. cit.*

² Louis Moricard: *De la responsabilité partielle ou atténuée*, thesis at the *Faculté de droit*, Paris, 1898.

³ Havelock Ellis: *Op. cit.*

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For the establishment of such a system is needed the development of a body of professional experts. To accomplish this it will be necessary to make the profession of medico-legal expert a regular career with a salary sufficient to attract able medical students. These students would specialize in the courses in legal medicine given in the medical school and it is possible that in course of time schools of legal medicine will be established. Medico-legal laboratories should be established in connection with the courts of appeal or in other central places where experiments in certain cases could be made, where students could obtain clinical experience and where the science of legal medicine would be developed very rapidly.¹

Medico-legal data should be accumulated and preserved in museums in connection with these laboratories. Rules for the examination of cases should be established and forms for keeping the records of cases uniformly. By these means medical jurisprudence would be greatly developed on a thoroughly scientific basis.

Turning now from medico-legal expert testimony to other forms of expert testimony we find that such testimony has to be given by chemists, physicists, mineralogists, zoologists, botanists, etc., and with regard to firearms, handwriting, photography, etc. Expert testimony can sometimes be furnished by a very ignorant and simple-minded person about a subject which is not a matter of general knowledge.

¹ A. Lacassagne: in the *Archives d'anthropologie criminelle*, Lyons, 1897.

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In fact it would not be possible to enumerate the subjects about which expert testimony may be required. But in the case of no one of these subjects is testimony needed so frequently nor is it so necessary to establish a judicial organization as in the case of legal medicine. However, a number of the points we have discussed with regard to medico-legal testimony are just as true of other kinds of expert testimony, as, for example, that it should be non-partizan and that it should always be remunerated sufficiently well to secure the best experts.

Expert testimony in general will always be a superior means of information at the disposal of justice, a new form of legal proof of which more and more use should be made. The reason for this is that judges are not competent to judge technical matters. But while the judge cannot be expected to have all this technical knowledge he should have a sufficiently general knowledge to know when such expert testimony should be used. Courses, therefore, should be given in law schools acquainting those who may become judges with the general nature of expert testimony and with the occasions on which such testimony is needed.

The above discussion of medico-legal and other forms of expert testimony shows how the variety of evidence required in criminal procedure has increased. In the days when it was considered necessary only to prove the commission of a criminal act the evidence required was comparatively simple. But as we have seen the principle of individualization is being applied more and more so that evidence

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as to the character of the criminal is being introduced into procedure. Furthermore the evidence as to the commission of a crime is becoming more complex. It is, therefore, necessary to make a scientific classification of evidence which will serve as a practical basis for a system of evidence based on scientific principles.

Generally speaking all the evidence presented in the course of a criminal trial is legal evidence. But this term applies more specially to the evidence furnished in proof of the commission of a criminal act. As we have seen, this proof is for the purpose of determining whether there is any need for criminal treatment. It is also a necessary protection to the individual member of society.

But when by means of legal evidence the commission of a crime has been proved it becomes necessary to introduce evidence with regard to the nature of the criminal. The second class of evidence, therefore, is anthropological. By means of physiological and psychological examinations evidence can be secured which will determine the kind of pathological treatment needed. The nature of the criminal has been influenced by environment also and this is of importance especially in the case of occasional criminals. The third class of evidence, therefore, is sociological. By gathering as much data as possible about the past history of the criminal can be determined the social influences which have acted upon him.

The means for gathering evidence should be as scientific as possible. In the first place the personnel

for gathering evidence should have as much scientific training as possible. We have already discussed in the chapter on the police agency such training for the police. In the chapter on prosecution and defense we have proposed that such work should be done by those who are preparing to become public prosecutors and defenders and later on judges. And as more use is made of anthropological evidence the scope of the system of medical jurisprudence we have outlined could be enlarged so that the medico-legal experts would be trained as criminal anthropologists also and could gather the necessary anthropological data.

A number of scientific devices can be used for gathering evidence. The sphygmograph is an instrument which reveals the inner emotions. It has already been used for detecting a guilty person and has great possibilities of usefulness. Hypnotism may be used for obtaining evidence though it should be used with great care, at least until scientific principles for its use have been worked out inductively. Criminals could be detained under observation for a period of time during which valuable physiological and psychological data can be gathered concerning them. These are but suggestions of the scientific means which can be used in gathering evidence.

After gathering evidence it becomes necessary to estimate its value. In the case of testimony its value depends upon its veracity. The standards according to which the value of testimony has been judged have been very naïve. Generally speaking

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testimony has been considered veracious except under certain exceptional circumstances which are indicated by the law of evidence. The oath has been regarded as a guarantee of the veracity of testimony. But there have also been strong protests against the oath. It has been contended that the oath cannot confer the capacity for telling the truth. The judge cannot be certain that the witness is veracious if he has no other evidence of the truth of his testimony. The oath is useless for the moral and for the religious man for they will try to tell the truth without an oath. It is also useless for the irreligious man who is also of a low moral character, for the oath will not influence him to tell the truth. The Swiss constitution says that no one shall be forced to perform a religious act and that therefore no one shall be forced to take an oath.¹ The oath is not compatible with liberty of conscience and belief. Especially absurd has seemed the oath of the accused. The canonical law in creating the inquisitorial procedure in the thirteenth century submitted the accused to the oath and this custom entered the law of almost all of Europe, the principal exception being England where it was not required on account of the accusatory principle.² The oath in this case necessitated the perjury of the guilty accused. The absurdity of this was shown by Beccaria in these words: "The laws are again in contradiction with nature when

¹C. Stooss: in the *Archiv für Kriminal-Anthropologie*, July, 1905.

²A. Esmein: *Le "Criminal Evidence Act" de 1898 et le serment des accusés en Angleterre*, Paris, 1898.

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they demand of an accused the oath to tell the truth when he has the greatest interest to suppress it; as if one could be obliged in good faith, by an oath, to contribute to one's own destruction; as if the voice of interest would not stifle in most men that of religion."¹

What then is the utility of the oath. It may secure a certain amount of subjective truth but very little if any objective truth.² That is to say, by the threat of punishment which its religious character implies it may remove the intention to hide the truth but this does not necessarily increase the capacity for telling the truth. The Romans seem to have regarded the oath as guaranteeing subjective truth only for Mommsen tells us that in the Roman penal procedure witnesses swore to what they thought they had seen or heard and not to what they knew.³ In other words it was an oath of good faith.

The oath may help a little to secure objective truth by increasing the attentiveness of the witness. As Munsterburg has expressed it: "It not only suppresses the intentional lie, but it focuses the attention on the details of the statement. It excludes the careless, hasty, haphazard remembrance and stirs the deliberate attention of the witness. He feels the duty of putting his best will into the effort to reproduce the whole truth and nothing but the

¹ *Op. cit.* Ch. XVIII.

² Hugo Münsterburg: in the *Times Magazine*, New York, March, 1907.

³ C. Stooss: in the *Archiv für Kriminal-Anthropologie*, July, 1905

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truth. No psychologist will deny this effect. He will ask only whether the intention alone is sufficient for success and whether the memory is really improved in every respect by increased attention. We are not always sure that our functions run best when we concentrate our effort on them and turn the full light of attention on the details.”¹ The utility of the oath for securing objective truth is, therefore, very slight indeed. If then the oath is to be used at all it will have its greatest utility in securing subjective truth from religious persons who are so weak morally as to be likely to give false testimony knowingly if not prevented by the threat of punishment implied in the oath. For the irreligious the oath is not only useless but it is an imposition upon their freedom of conscience and it should be substituted in their case by a simple affirmation of intention to tell the truth.

There is a pretty general confidence in the veracity of testimony. If there is any suspicion it is of the intention rather than of the ability of a witness to tell the truth. It is subjective rather than objective truth that is questioned. This confidence has probably grown out of the fact that most of our knowledge is based on testimony and that we have an instinctive dislike of uncertainty. The guarantee of veracity which the oath is supposed to furnish confirms this confidence. But as we have seen the oath is a very slight guarantee and we must look for another test of veracity.

¹ *Op. cit.*

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During the last few decades experimental psychology has been so greatly developed as to have become an almost independent science. One of the subjects to which a great deal of attention has been given is that of the reliability of memory. A magazine is devoted to it in Germany and it has a literature of its own. Since this is the most important psychological problem connected with legal testimony this new science is of the greatest practical significance for procedure. And yet no use has yet been made of it in the administration of justice. Experts are called into court to decide questions as to insanity, handwriting, etc., but no psychological expert has yet been summoned to test the veracity of a witness not merely with regard to his intention to tell the truth but also with regard to his ability to do so.

Occurrences are constantly taking place which reveal to what an extent testimony is inaccurate. This frequently happens in trials. For example, in a trial in Germany three witnesses, an architect, a teacher, and an elevator man testified each as follows as to how they went down together in an elevator; the architect, that all were standing up, the teacher, that he sat and the others stood, the elevator man, that he stood and the others sat.¹ Now it is evident that at least two and possibly all three of these witnesses were not telling the truth. And since it is very doubtful that they were lying intentionally this inaccuracy must have been due to unreliability of memory. Many experiments have

¹ *Archives d'anthropologie criminelle*, Lyons, March, 1906.

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been made which show to how great an extent testimony is untrustworthy. And these experiments do not fully reveal the inaccuracy of ordinary testimony for the conditions of every day life are not as a rule entirely reproduced. A witness is usually unaware at the time of an occurrence about which he has to testify later on that he will ever have to testify about it. In a laboratory experiment, on the contrary, the witness usually knows that he will have to testify about the thing or occurrence which he has seen and therefore pays special attention. However, even this difference has been removed in some experiments. Such was the case in an experiment¹ made at a meeting of the "Association of Legal Psychology and Psychiatry of the Grand-duchy of Hesse" at Gottingen. During one of the sessions a clown and a negro rushed in and after an excited altercation rushed out. Each person in the audience, for whom this occurrence was quite unexpected, was asked to write an account of it. Forty reports were handed in and of these there was only one whose omissions of important details amounted to less than twenty per cent. Fourteen omitted twenty to forty per cent. of the important details, twelve omitted forty to fifty per cent., and thirteen more than fifty per cent. There were only six that did not make absolute misstatements of fact; in twenty-four up to ten per cent. of the statements were manufactured, and in ten more than ten per cent. of the statements were

¹ L. W. Weber: in *the Beiträge zur Psychologie der Aussage*, Vol. IV, also Hugo Münsterburg, *Op. cit.*

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absolutely false. We have no space to describe any more of these experiments but they all show to how considerable an extent all testimony is inaccurate. We must now consider to what causes this inaccuracy is due and how the data of experimental psychology can be applied to legal testimony.

To determine the causes of erroneous testimony we must go back of the memory from which this testimony comes. "The sources of error begin, of course, before the recollection sets in. The observation may be defective and illusory; wrong associations may make it imperfect; judgments may misinterpret the experience; and suggestive influences may falsify the data of the senses. Every one knows the almost unlimited individual differences in the power of correct observation and judgment. Every one knows that there are persons who, under favorable conditions, see what they are expected to see. The prestidigitators, the fakirs, the spiritualists, could not play their tricks, if they could not rely on associations and suggestions, and it would not be so difficult to read proofs if we did not usually see the letters which we expect."¹

The primary cause of error may be the abnormal state of the sensory organs. The inability of these organs to convey correct impressions of occurrences external to the body may be due to congenital causes. Or it may result from deep seated nervous diseases such as epilepsy, alcoholism, hysteria, mental degeneracy, neurasthenia, cerebral syphilis,

¹ H. Münsterburg: *Op. cit.*

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etc.¹ Or it may result from a temporary condition such as a wound in the head or a high state of emotion. But even if the sensory organs convey faithful impressions of these external occurrences these impressions may become falsified within the brain. The judgment may misconstrue these sensory impressions. The influence of age, sex, profession, belief, etc., must be noted in this connection. Each impression on entering the brain tends to awaken the memory of past impressions. These past impressions by combining with the new impressions and in course of time by filling lapses in the memory of the new impression tend to render the memory of that impression inaccurate. After it has entered the memory an impression may be modified from outside by means of suggestion. These are but suggestions of the causes which alone or combined tend to render memory unreliable.

Witnesses may be classified according to sex and age or according to their peculiarities in giving testimony. In some ways young children are good witnesses since they have no beliefs or prejudices to bias their testimony. But it is impossible for adults to put themselves at their point of view to know how they see things since they have not as wide an outlook as adults and do not see things in the same proportion.² Their imagination is without restraint and they lack a sense of responsibility. They have a strong suggestibility and lie for very

¹ A. Cramer: in the *Beiträge zur Psychologie der Aussage*, Vol. II.

² Hans Gross: *Manuel pratique d'instruction judiciaire*, Paris, 1899.

different motives or for no motives whatever. They lack an exact notion of time and have a general absence of abstract ideas.¹ The young boy is usually a better witness than the young girl because he observes more carefully. The young girl is not so good a witness because she stays at home and sees little of the world. She has too vivid an imagination and frequently gives false testimony for the sake of excitement. The youth are much absorbed in themselves, the girl in her balls, love-affairs, etc., the young man in his work, studies, etc., so that they tend to be rather careless in their observation. Adults observe carefully what they notice, but their attention follows the line of interest and their observations tend to become colored by their beliefs and prejudices.²

Witnesses may be classified according to their desire to tell the truth. Those who do not intend to tell the truth can very frequently be found out by means of methods discovered by experimental psychology and the truth forced from them in spite of themselves. But even those who desire to tell the truth very frequently fail to do so for reasons which have been suggested above. These include many types passing from the very pathological such as the insane, the paranoiac, the hysterical, etc., to the normal or nearly normal who give false testimony unwittingly on account of psychological errors to which any normal person is liable. Witnesses

¹ Dr. Placzek: in the *Archiv für Kriminal-Anthropologie*, reviewed in the *Archives d'anthropologie criminelle*, Lyons, March, 1906.

² Hans Gross, *Op. cit.*

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may be classified according to the types of memory they represent. "There are different types of memory and with a very crude and superficial classification they might be grouped as visual, acoustical and motor types. There are persons who can reproduce a landscape or a painting in full, vivid colors and with sharp outlines throughout the field, while they would be unable to hear internally a melody or the sound of a voice. There are others with whom every tune can easily resound in recollection and who can hardly read a letter of a friend without hearing his voice in every word, while they are utterly unable to awake an optical image. There are others again whose sensorial reproduction is poor in both respects; but they feel intentions of movement, as of speaking, of writing, of acting, whenever they reconstruct past experience. In reality the number of types is much larger. Scores of memory variations can be discriminated."¹

To what use can these data of experimental psychology be put in practical jurisprudence? We have seen that witnesses vary greatly in their capacity to tell the truth and that the value of their testimony varies accordingly. This certainly is a fact of great practical importance for procedure since weight should be given to testimony in proportion to its value. How then is its value to be determined? In the first place this can be in part accomplished by a psychiatric and psychological examination which will establish the principal

¹ Hugo Münsterburg: *Op. cit.*

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psychological characteristics of the witness. In the first part of this examination would be determined to what extent if any a witness is pathological, that is to say, if his sensory organs are in any diseased condition or if he is lacking in capacity to fix the attention or in ability to reproduce what he has seen. But this examination should be carried further to determine the normal psychological peculiarities of a witness. For example, by a simple test the type of memory of a witness can be determined and this fact is of great significance in estimating the value of his testimony about a particular occurrence. "Now we should not ask a short-sighted man for the slight visual details of a far-distant scene, yet it cannot be safer to ask a man of the acoustical memory type for strictly optical recollections. No one on the witness-stand is to-day examined to ascertain in what directions his memory is probably trustworthy and reliable; he may be asked what he has seen, what he has heard, what he has spoken, how he has acted, and yet even a most superficial test might show that the mechanism of his memory would be excellent for one of these four groups of questions and utterly useless for the others, however solemnly he might keep his oath."¹ In similar fashion the other psychological characteristics can be determined. "The courts will have to learn, sooner or later, that the individual differences of men can be tested to-day by the methods of experimental psychology far beyond anything which common sense and social experience suggest.

¹ Hugo Münsterburg: *Op. cit.*

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Modern law welcomes, for instance, for identification of criminals all the discoveries of anatomists and physiologists as to the individual differences; even the different play of the lines in the thumb is carefully registered in wax. But no one asks for the striking differences as to those mental details which the psychological experiments on memory and attention, on feeling and imagination, on perception and discrimination, on judgment and suggestion, on emotion and volition, have brought out in the last decade."¹

It has been suggested that by means of such an examination can be determined the "constants of certitude" of the witness or the degree of accuracy of his testimony and that the value of his testimony could be estimated according to this constant number.² It is doubtful, however, if this would be wise since the value of a person's testimony varies according to the nature of the occurrence about which he is testifying. Such an examination, also, would probably not be necessary for every witness. It would be necessary when the testimony was about a very complicated situation and where the testimony was contradictory. It should always be given to a witness whose testimony is decisive especially when there is contradictory testimony on essential points. It would be necessary to have a psychological expert attached to each court. The medical expert could

¹ Hugo Münsterburg: *Op. cit.*

² Otto Lipmann in the *Archiv für Kriminal-Anthropologie und Kriminalistik*, July 6, 1905.

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as a rule be given the training which would fit him to perform these functions. In an office adjoining the courtroom he could, whenever necessary, perform very quickly the few tests which would determine the psychological peculiarities of a witness.

But the practical utility of these data of experimental psychology does not cease with an examination of a witness by a psychological expert. All who take part in conducting an examination or trial such as judges, prosecutors, counsel for the defense, etc. should be acquainted with these data. They would then know that the reliability of testimony is, as a rule, in inverse ratio to the certainty of the witness because the witness who doubts his own memory is most careful in his affirmations. They would know that the recognition of a suspected person is of value only when made from a group of persons for confrontation by a single individual has too strong a suggestive influence, especially when the press has already published the picture of the person to be recognized. They would know that with repetition depositions become more precise but less exact. They would know under what circumstances a witness should be sent to the psychological expert for a psychological examination.

There would be, also, one other occasion on which a witness could be sent to the psychological expert. This would be when there was reason to believe that a witness was lying or was not telling as much as he knew. By a study of the association of ideas in the mind of the witness much can be learned as to whether he has been lying and as to

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the true contents of his memory. "For instance, our purpose may be to find out whether a suspected person has really participated in a certain crime. He declares that he is innocent, that he was not present when the outrage occurred, and that he is not even familiar with the locality. An innocent man will not object to our proposing a series of one hundred associations to demonstrate his innocence. A guilty man, of course, will not object, either, as a declination would indicate a fear of betraying himself; he cannot refuse, and yet affirm his innocence. Moreover, he will feel sure that no questions can bring out any facts which he wants to keep hidden in his soul; he will be on the lookout. As long as nothing more is demanded than that he speak the first word which comes to his mind, when another word is spoken to him, there is indeed no legal and no practical reason for declining, as long as innocence is professed. Such an experiment will at once become interesting in three different directions as soon as we mix into our list of one hundred words a number, perhaps thirty, which stand in more or less close connection to the crime in question—words which refer to the details of the locality, or to the persons present at the crime, or to the probable motive, or to the professed alibi, and so on."¹ The three directions of interest in this experiment would be the choice and the constancy of the associations and their involuntary retardation by emotional influence. These

¹ Hugo Münsterburg: in *McClure's Magazine*, New York, October, 1907.

frequently throw a flood of light upon the contents of the mind. As Munsterburg has pointed out this psychological test can take the place of the vulgar and frequently brutal ordeals of the "third degree." "The third degree may brutalize the mind and force either correct or falsified secrets to light; the time-measurement of associations is swifter and cleaner, more scientific, more humane, and more reliable in bringing out the truth which justice demands."¹

The use of spontaneous and suggested testimony should be governed by the psychological characteristics of the witness. As a general rule spontaneous testimony is much more accurate than suggested testimony though not as full. For this reason suggestive questions should usually be avoided especially in the case of a witness with a strong imagination. But sometimes in the case of a laconic witness who has no interest in the affair it becomes necessary to ask suggestive questions in order to draw out the testimony. These questions should be framed very carefully in order to avoid influencing the character of the testimony. The suggestive power of the press should always be taken into account whenever it has influence upon the testimony of a witness.

A phonograph may be used at times to record testimony in order to give the tone and expression of the witness, thus preserving the subjective elements of the testimony in a way that a written record cannot do.

¹ Hugo Münsterburg: *Op. cit.*

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The above discussion shows the practical significance of experimental psychology for legal evidence. So far evidence has been judged by purely empirical rules and principles which have frequently been wrong as indicated by Ferri in the following quotation: "The child as a witness is the voice of innocence (when it is too often the dupe of auto-suggestion or of suggestion from another), or; the witness who is frank and sure in what he says is the most sincere (when more probably he recites words learned by heart), or; probability is the surest criterion of truth (while too often the truth is very improbable), etc."¹ The principles of experimental psychology should, therefore, be applied as soon and as much as possible. The determination of the veracity of legal and sociological testimony would then be in accordance with these principles.

The theory of the law so far has been that the testimony of one witness is as good in quality as that of another. But this theory has never been carried out in practise because judges, whether professional or lay, have always given more weight to the testimony of some witnesses than to that of others in accordance with empirical principles such as have been suggested above. This is in accordance with psychology on account of the great differences between witnesses but the discrimination between witnesses should be made according to scientific principles. The judges should therefore be acquainted with these scientific principles.

¹ *La justice penale*, Brussels, 1898, p. 62.

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This matter will be taken up in the next two chapters on the jury and the judiciary.

The results of the physiological and psychological examination should be tabulated and then this evidence should be analyzed and discussed by the prosecution and defense in the course of the contradictory debate. Those engaged in this debate should therefore have the requisite scientific knowledge in order to enable them to conduct this discussion intelligently.

When the reforms indicated above have been accomplished the scientific stage of evidence will have arrived. Evidence will then be gathered and its value estimated according to scientific principles based on expert knowledge derived from experiments and from data which have been systematically collected and studied.

CHAPTER X

THE JURY

The institution of the jury is very ancient. Under the Mosaic law the elders performed this judicial function. In ancient Athens this function was performed by the *Heliastes*. The Roman jury had jurisdiction in civil cases only. A list of jurors, called "*judices jurati*," was prepared but the parties could choose other jurors if they wished. Among the German tribes the citizens had the power of judging. The feudal jury was composed of the peers of the accused. But the jury which is of practical importance for us, since it has existed down to the present day, is the one which was developed in England.

The origin of the English jury is difficult to determine. One theory is that it came from the ancient Scandinavian jury by means of the Danish. Another theory is that it came from the judicial assemblies of the Saxons. But wherever it may have first originated it was greatly influenced in its development by a form of jury introduced into England at the time of the Norman conquest from the procedure of inquiry of the ancient French law known as the "*inquisitio*." In this procedure

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the judge summoned a certain number of citizens, never definitely fixed, worthy of confidence and acquainted with the facts and after swearing them in asked them for their opinion. The "inquisitio" was first used for fiscal affairs and matters concerning the property of the church. It was later extended to the affairs of widows, orphans, and feeble persons in general. Henry II, Duke of Normandy, made it an organic part of the Norman law so that under certain conditions it could be demanded in any case. When Henry went to the throne of England as its conqueror this method of proof was introduced as the "*recognitio d'assisa*." It extended at first only to questions of property (*magna assisa*) and of possession (*parva assisa*).

At first the jurors in the English jury were only witnesses whose duty it was to testify from personal knowledge and sometimes to offer an opinion. Later they acquired the power to judge as well as to testify and then became judges and no longer witnesses.

In 1166 appeared the jury of denunciation which later became a jury of accusation, now known as the grand jury. The coroner's jury was instituted to investigate violent deaths and to make accusations when it saw fit. Up to the reign of Edward III, the same persons could be the jury of accusation and that of judgment but since then this has not been possible.¹

¹ Cf. Ludovic Nagels and George Meyers: *Les lois du jury*, Brussels, 1901.

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The uncertainty of our knowledge concerning the early English jury is indicated in the following quotation: "Assizes, in our sense of the word, are the direct descendants of the *itineræ*, or eyres, which were first reduced to a system, by no means unlike our circuits, in the time of Henry II. The business of these eyres was to hold inquests in every part of the country as to crimes, as to civil suits, and as to a vast variety of matters connected with revenue, feudal services, etc., specified in the commissions under which the justices sat, and varying from time to time, according to circumstances. No perfectly distinct account can be given of the proceedings before a justice in eyre as they originally were, but it is clear that the first step was to call together the principal persons of the county and to require them to report upon the crimes which had been committed in the county since their last appearance."¹

But we cannot trace in detail the historical development of the jury though it was necessary to give some indication of its origin for the light it throws upon the underlying theory of the jury. From England the jury went to America where it is used among Anglo-Saxon peoples almost if not quite as extensively as in England. The English jury did not go on to the Continent until the time of the French Revolution. The use of torture as a mode of proof was then abolished and the introduction of the jury was in harmony with the spirit of

¹J. F. Stephen: *A General View of the Criminal Law of England*, London, 1890, p. 15.

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the times. "At the end of the eighteenth century, when the thought of scientists and of jurists was tending towards the establishment of a class of independent magistrates, the French Revolution, full of mistrust with respect to all aristocracy, all social caste, of enthusiasm for the omnipotence and omniscience of the people, opposed this tendency and instituted the jury."¹ From France the jury spread to most of the countries of Europe.

The jury is based upon certain principles which have been gradually formulated in the course of its history and which are always used as arguments in its favor. The jury is regarded as the "bulwark" or "advance guard" of liberty because it is supposed to protect the rights and liberties of the people against encroachments by the central power. It represents public opinion and keeps the judge and justice in touch with the public conscience. It is a school of citizenship. It is entirely independent and therefore irresponsible. Its moral judgment serves as a corrective for the laws. Its deep conviction and conscience fresh to all judicial matters furnish the best means of judging evidence. We shall not stop to comment on these principles now but will return to them after studying the workings of the jury system.

As has already been indicated there are two kinds of juries, the jury of accusation or grand jury, and the jury of judgment or petit jury. The second is by far the most important and we shall now devote considerable attention to its study.

¹ E. Ferri: *La sociologie criminelle*, Paris, 1905, p. 533.

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We must first study the personnel of the petit jury and the characteristics of the individual juror in order to understand its workings. The machinery by which jurors are chosen varies more or less in different places. It is, however, almost if not quite the universal custom to exclude manual and day laborers. Many professional men, also, such as doctors, clergymen, lawyers, etc., are excluded as well as many others in the upper classes. Thus the tendency is to exclude the lowest and upper classes. It was found that out of fifteen hundred jurors of the Department of the Seine in which Paris is situated, more than half were small merchants so that at least seven members of each jury are pretty certain to be merchants.¹ In the Department of the Sarthe in France, which is an agricultural section, jurors are usually small farmers.² The standard of intelligence of the jury is, therefore, at best mediocre. The number of jurors in the petit jury is invariably twelve.

Taking up now the characteristics of the individual juror we must note first the difficulty with which most jurors perform this service. It is not easy for a merchant or a farmer to leave his work, the fees not being sufficient usually to pay for the loss of time. This is why an effort is made by so many jurors to be excused at the beginning of their term of service. Sometimes a juror will induce a lawyer to challenge him in order to be relieved from serving on a jury. On the other hand

¹ Jean Cruppi: *La cour d'assises*, Paris, 1898.

² Maurice Ajam: in the *Archives d'anthropologie criminelle*, Lyons, 1899.

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there are a certain number of jurors who are anxious to serve, some of them in order to get a reputation in their neighborhood, others to earn the fees. These last belong usually to a very low type of juror.

The jurors who are forced to serve are usually inspired by a very sincere desire to serve well if not disturbed by external influences which will be indicated later. A juror usually feels the responsibility of his position and is desirous of filling it well. When he sees the accused before him a humanitarian feeling leads him to want to do justice.

But jurors are greatly hampered by their ignorance. They are ignorant, as a rule, of legal procedure and documents. "The largest part of the injustices committed by the jury, comes in reality from its ignorance, either on account of its incapacity to grasp the meaning of several juridical terms, and to understand the true significance and the connection which binds together the questions, often very numerous, which are submitted to it; . . . or on account of the lack of aptitude or of experience necessary for the critical study of evidence, of proofs and of arguments for and against, in trials where guilt is not evident at the first glance."¹ Experience is necessary to be able to separate significant from insignificant details in the evidence and this experience most jurors lack. Furthermore, jurors know little or nothing about crime and criminals. They have not even the empirical

¹ R. Garofalo: *La criminologie*, Paris, 1905, pp. 388-389.

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knowledge that judges and lawyers acquire, to say nothing of a knowledge of criminal anthropology and sociology.

This ignorance will usually disquiet a juror and he will go in search of information. But very little information is furnished. In England books of instructions to jurors are published which a juror may read and in France a vague printed statement is given to jurors which tells very little. Consequently most of the information of a juror is of a very haphazard sort, much of it sometimes coming from a court attendant. This ignorance tends to develop a suspicious attitude on the part of the juror towards all concerned in the trial, towards the judge whose exalted position puts a barrier between the juror who is a judge of circumstance and the judge of profession, towards the lawyers on account of their partizan position, etc.

Many influences act upon a juror in the course of a trial. Perhaps the principal influence is that exerted by the lawyers. On account of the ignorance of jurors a skillful lawyer can frequently deceive them as to the true significance of evidence. Consequently cases are frequently determined by the respective ability of opposing lawyers to accomplish this and not upon the merits of the case. An American judge has described this influence of the lawyers over the jury in the following words: "It seems strange that while this extreme jealousy exists on the part of courts and counsel as to protecting juries against every improper

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influence, so great latitude should be given to advocates in summing up. Fiery and eloquent appeals, logic, rhetoric, personal influence, the advocate's own statement of the facts in the case, his special version of them, and denunciation of the jurors in case they do not find in his favor, are all permitted. It is not by any means the most learned, sound, and honest lawyer, or the one that has the best case, that usually succeeds with a jury; it is he, rather, who has a profound knowledge of human nature, and who can tell what he does not know as well as what he does know, in a pleasing, ready, and insinuating manner. In many cases advocates have at one time been for the plaintiff in one cause, and a few days later for the defendant in another, with precisely similar facts and principles involved; and yet have won both cases, sometimes before the same jury. Frequently a client's cause is virtually won the moment that certain counsel accept the retaining fee. Herein lies one of the greatest dangers of the system. The able advocate has greater influence than have the merits of the case."¹ On account of this influence which lawyers have over jurors they will indulge in a great deal of oratory and claptrap in every trial in which there is a jury, thus distinctly lowering the intellectual standard of the trial.

The judge has considerable influence over the jurors. In England the jury has great confidence in the judge and the summing up of the judge is

¹ E. A. Thomas: in the *Forum*, New York, March, 1887, p. 107.

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likely to influence the jury greatly. In France and elsewhere on the Continent this summing up has been abolished because it was believed that it influenced the jury too much. This was probably due to the tendency of the Continental judge to be partial to the prosecution. But the Continental judge is sometimes able to influence the jury in another way. In Continental procedure the jury may call the presiding judge in to its council chamber to consult with him and ask his advice. Under these circumstances the judge is frequently able, if he wishes, to influence the jury considerably. This is manifestly wrong and if the judge is to meet the jury at all it should be in the presence of the plaintiff, defendant and counsel for the defendant. The jury is influenced by its general impression of the judge. If it is pleased with the judge it will usually do what it thinks will please him. But if it loses confidence in the judge on account of some mistake made by him or if displeased with his personality it will oppose him as much as possible in order to spite him.

The jurors, and therefore the jury, may be greatly influenced by the appearance and personality of the defendant or plaintiff. For example, in the case of a crime of passion the jury may be strongly moved by the personality of the defendant. On the other hand in the case of a crime against the person the sympathies of the jury may go out very strongly to the victim of the crime on account of the suffering and injury which his or her appearance manifests. It is this influence of

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the personality of the accused over the jury which has led the jury to individualize punishment though, as we have seen, this individualization has not always been on a rational basis, as, for example, when the jury is influenced by the social prestige of the plaintiff or of the defendant.

The jury is in general very impressionable and frequently the strongest impression it receives will govern its action rather than a careful weighing of the facts. This is illustrated by the power of the "incident" which is a circumstance only relatively important but which suddenly assumes very great or even absolute importance in the minds of the jurors and decides a case.¹ This "incident" is usually brought about by a lawyer who suddenly presents this circumstance with a great deal of force under dramatic circumstances thus making a great impression upon the minds of the jurors. The more the contradictory debate is logical and well regulated the more rare is such an incident.

The press and the public sentiment of the moment have much influence over the jury. Local prejudices influence the jury greatly in its decisions, so that in a certain community the jury will always be more than usually severe upon a certain crime because it is peculiarly obnoxious to that community. Towards other crimes it may be unusually lenient.

The trade or profession of a juror is likely to influence him in his decisions by giving him a peculiar point of view. The juror may have heard

¹ Cf. Jean Cruppi: *Op. cit.*

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of a theory of criminality which will influence him in an unthinking way. Thus he may regard the criminal as the result of heredity, as the fault of society, or as dangerous to society and entirely responsible, and be guided entirely in his decision by a unilateral theory.

A fundamental characteristic of the juror is his lack of a power of attention. Not being used to follow the workings of a court many jurors after the first few minutes fall into a semi-conscious dreamlike state in which they hear very little of the evidence or arguments. Consequently the important points do not become impressed upon their minds as they should be, especially in a long trial. This power of attention can be developed only through training and habit. It is a noticeable fact that old judges have a fresher attention usually at the end of a trial than young judges, this being due to their longer experience.

Having discussed some of the characteristics of the individual juror we may now turn our attention to the functioning of the jury. The method of selecting a jury is entirely mechanical, the jurors being chosen by lot from the list of jurors. No attempt is made to make a jury representative of different classes or professions so that a jury is frequently made up entirely of merchants or of farmers. The designation of the foreman is usually automatic, the first juror chosen being the foreman. But in Germany the foreman is elected by the jury when it begins its deliberations. In England the jurors take notes quite freely and ask

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questions quite frequently in the course of the trial. Elsewhere this is not so common.

Cases may be classified according to their relative influence on the jury into those in which the crime has the most influence and those in which the accused has the most influence. An illustration of the first class would be a larceny or forgery coming before a jury made up largely or wholly of merchants who would be very severe on this kind of a crime. An example of the second class would be a criminal of passion whose personality would appeal strongly to the jury. In such a case the jury would tend to individualize and it was to permit of this, as we have seen, that the expedient of extenuating circumstances was introduced into Continental procedure.

The contradictory debate varies in different countries according to the nature of the people. In France the tendency is to appeal to the passions, in England the tendency is towards excessive casuistry, but everywhere an oratorical character is given to the debate and a great deal of sentimental claptrap is introduced on account of the predominance of sentiment over reason in the jury. "This predominance of sentiment over reason, which is the fundamental note of the jury, manifests itself first of all and very clearly in the direction taken by the public debates. In them there is no need for profound philosophic or juridical studies; to what would they be applied? As for the criticism of evidence and as for logic, these can be dispensed with; what is extremely,

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solely necessary is oratorical charm.”¹ The result is that the debate tends to confuse the jury as to the main points at issue by covering them up. But it keeps before the mind of the jury the punishment which, since it is a question of law and not of fact, is not supposed to be considered by the jury. Lawyers are constantly drawing the attention of the jurors to the penal consequences of their verdict and their humanitarian instincts force them to think of it. The expedient of extenuating circumstances is a recognition of this fact.

After the debate comes the summing up or charge to the jury of the judge in which he states the juridical aspects of the questions at stake and reviews the main features of the evidence. A sober presentation of these facts by the judge has as a rule a beneficial effect on the jury though, as we have already noted, this summing up has been abolished in France and elsewhere on the Continent, on account of the danger of the judge being partial to the prosecution.

After the charge from the judge the jury retires to deliberate unless they are able to make a decision immediately. The tendency is for the jury to break up first into knots of two or three, discussing the question rather incoherently. Then as the most pronounced opinions begin to appear the discussion becomes more general with the exponents of these opinions dominating, the others remaining more or less silent. Very frequently

¹ E. Ferri: *Op. cit.* p. 544.

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in accordance with the psychology of crowds a single person dominates all the others.¹ This leader is not necessarily the most intelligent member of the jury, but has the most stubborn will by means of which he overbears the convictions of the others. He is assisted in this by the necessity of coming to a decision, especially in England and America where unanimity is required. On the Continent only a majority is required which permits of differences of opinion. During their deliberations the jury may be influenced a little by the judge, especially on the Continent where he meets them alone. They are usually kept carefully secluded from the public during their deliberations though in some European countries they are permitted to go out in the intervals of their deliberations which is manifestly wrong since it results in bribery and other forms of corruption. The decision of a jury is final since there is no way of appealing from it.

Let us now consider the faults and weaknesses of the jury, some of which have already been indicated. In the first place it has local faults, as, for example, in Southern Italy it is susceptible to bribery, in France it is influenced by political feeling, etc. It tends in general to be weak where frequency of crime demands strength on account of the leniency of jurors who are likely to commit the same crimes. Thus the Italian jury is lenient

¹ Cf. G. Le Bon: *Psychologie des foules*, Paris, 1895, Book III, Chap. 3, and Maurice Ajam, *Op. cit.*

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towards the use of knives, the Corsican jury towards the use of firearms, etc.

There is almost no guarantee of the incorruptibility of the jury since the giving of a bribe, etc., could be detected with great difficulty. The juror can accept a bribe with little danger since he is very soon to return to private life and has no public reputation as a judge to sustain.

The jury is not always a safeguard of the people's rights and liberties against the encroachment of a despot or other central power. On the contrary history shows us that very frequently on account of corruption and intimidation the jury is weakest when the central power is most tyrannical. "This occasion may be taken, for want of a better, for adverting to another popular misconception as to trial by jury, namely, that it has always been the Palladium of our liberties, etc., etc., and a defense against unjust prosecution, or persecution by the Crown, or the higher powers. The case has not only not always been so, but very often exactly the opposite, since in former times juries were constantly forced to act as cat's-paws to tyranny, and thus serve its purposes by enabling it to evade the odium which would have attached to mere bare-faced oppression, too insolent to care about disguising or masking its own direct and independent action. Jeffreys might hardly, perhaps, have rioted through his celebrated campaign with such uninterrupted success, without the instrumentality of terrified juries, since the spectacle of a pitiless fiend, sending people wholesale to torture and

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unjust execution, and doing this unsupported by any pretence, even in form, of acquiescence on the part of the country, might have proved too much for human endurance."¹ "The records of the State trials show how difficult it must often have been for juries to hold their own against the violence of the Bench. In Sir Nicholas Throckmorton's case, for example, which was tried in 1554, the jury, on finding a verdict of acquittal were sent to prison. Four of the number were soon afterwards discharged on humbly admitting that they had done wrong, but the remaining eight were brought before the Star Chamber, and most severely dealt with. Three were adjudged to pay £209 each, and the rest £200 each."²

Stephen, though an advocate of the jury system, has admitted its weakness in the face of tyrannical power. "They (juries) are also capable of being intimidated, as the experience of Ireland has abundantly shown. Intimidation has never been systematically practiced in England in modern times, but I believe it would be just as easy and just as effective here as it has been shown to be in Ireland. Under the Plantagenets, and down to the establishment of the court of Star Chamber, trial by jury was so weak in England as to cause something like a general paralysis of the administration of justice. Under Charles II it was a blind and cruel system. During part of the reign of George III it was, to say the least, quite as severe as the

¹ T. W. Erle: *The Jury Laws and their Amendment*, London, 1882, p. 121.

² T. W. Erle: *Op. cit.* p. 123.

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severest judge without a jury could ever have been. The Revolutionary tribunal during the Reign of Terror tried by a jury."¹ Thus we see that the jury has failed to resist every kind of tyranny even that of the people. "In England in the sixteenth and seventeenth centuries, in France during the Revolution and the Restoration, the jury has nearly always been the faithful servant of the most powerful; it has succumbed to all kinds of tyrannies, to that of the throne as well as that of the populace."²

The power of the jury to correct the law is in many ways a dangerous one. As we have already noted one of the underlying principles of the jury is that its moral judgment acts as a corrective of the law. And there is no doubt that the jury has at times served a useful purpose by relieving the rigidity or arbitrariness of a law in its application, or by condemning a law by refusing to enforce it. An example of this is the way in which the jury has stimulated the individualization of punishment. But the question may be raised whether the reform of the law should belong to a judicial institution since this results in a confusion of legislative and judicial functions. By refusing to enforce a law the jury makes it a dead letter. This power of the jury tends to discourage the zeal of promoters of legislative reform. Furthermore it encourages the transgression of the laws by lessening

¹ J. F. Stephen: *A History of the Criminal Law of England*, London, 1883, Vol. I, p. 569.

² R. Garofalo: *Op. cit.* p. 396.

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their value in the public esteem. "The citizen, who, in his functions as juror or in seeing the jury function, understands that one can go to the point of putting the law aside, loses more and more the feeling of the intangibility of social prescriptions. It is a double-edged weapon. 'It is better to put the remedy in the law than in the subversion of the law'."¹ In a day when the people had little or no legislative power it may have been justifiable to give the jury legislative functions. But this is no longer necessary under the present democratic régime.

The present distinction between law and fact causes incoherence of action on the part of the jury. It is supposed to be a judge only of facts. But, as we have seen, it cannot avoid being influenced by the personality of the accused and considering the penal consequences of its verdict which is a question of law. As its knowledge of the law is very vague it cannot give an exact expression of its opinion in its verdict. Thus a jury will sometimes acquit in a case where it believes that the accused is guilty but it fears that the penal consequences of a verdict of guilty will be heavier than the accused deserves.

The jury tends in general, as we have seen, to be governed by isolated facts selected and emphasized by the sentiments rather than by logic and reason.

Let us now consider what measures can be taken to correct some if not all of these faults of the jury

¹ E. Ferri: *Op. cit.* p. 538.

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and to strengthen its weak points. The reform which is, perhaps, most frequently advocated is the raising of the standard of intelligence of the jury. This would, probably, increase the independence and impartiality of the jury, for a more intelligent group of men would be less likely to be influenced by local or other prejudices or to be intimidated or corrupted. But there are psychological reasons for believing that the increase in the intelligence of the action of the jury as a whole would not equal the increase in the average intelligence of the members of a jury. It is the tendency of every group to act less wisely than the average member of the group. "The union of a certain number of persons in general intelligent is not a pledge of the eventual capacity which will result from it for the whole, because, in the psychological domain, a union of individuals never gives, as it would seem must take place, a total equal to the value of each of them. In grouping intelligent individuals it is very possible to form an assembly which is not intelligent, just as in chemistry the union of two gases can give a liquid body. The deleterious elements, which in isolated individuals remain hidden, are united with each other and as a consequence of psychological affinity and fermentation, take the upper hand. The ancients had a presentiment of this fact when they said: *Senatores boni viri, senatus autem mala bestia* (the senators are virtuous men, the senate is a mischievous beast); the people feels this when it says of certain social groups that their members taken one by one are

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good, but that taken together they are rascals."¹ It is also true that a group or crowd will sometimes act with better motives than those of its individual members since a generous impulse will sometimes carry away a group where it will not influence individuals. But it is doubtful if a group ever acts more wisely than the average intelligence of its members. Especially true is this of a heterogeneous group such as a jury whose members are strangers to each other and differ more or less from each other in ideas, habits, etc. It has been noticed that jurors do better work after getting acquainted with each other. For these reasons it is doubtful if an increase in the intelligence of the jurors would make much difference in the effectiveness of the jury. Unless a group is judging a question about which its individual members have expert knowledge its judgment is not worth much, however intelligent the members may be.

When the jury elects its own foreman, as is done in Germany, the foreman is more likely to be fitted for his duties and will do more to make the discussion coherent and logical. It has been suggested that a lawyer who is not connected with the case but who may be challenged by either side act as the head of the jury.² Under such guidance the jury could probably do better work.

It helps the jury to have a list of questions which are to be decided by it prepared by the judge as is

¹ E. Ferri: *Op. cit.* pp. 541-542.

² R. de la Grasserie: in the *Revue internationale de sociologie*, Paris, 1897.

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done in Germany. As a matter of fact this is done for it verbally in the summing up by English and American judges.

If a jury were required to give a motive or reason for every decision its discussion would probably be more logical. This, however, may be objected to on the ground that it is a violation of the independence of the jury and might furnish grounds for appeal.

It is evident that it is impossible to prevent the jury from considering the penal consequences of its verdict and thereby judging a question of law as well as of fact. This has resulted in a tendency towards the suppression of this distinction between fact and law. As a matter of fact the crime, which is the only thing the jury is supposed to judge, is a juridical fact and, as we have seen, it is impossible to separate the crime from the punishment when judging. As Ferri has said, "law and fact, in a penal process, are inseparable like the right side and wrong side of the same piece of cloth, even when one is careful, as in the different legislative modifications effected in Italy, to avoid as much as possible juridical terms."¹ Various sugges-
tions have been made as to how the functions of the jury can be broadened and how it can be given the power of deciding upon the penalty as well as upon the question of guilt. In Scotland still exists the verdict of "not proven" which was known in the Roman law as *non liquet*. It has been suggested that this be restored because it would give

¹ *Op. cit.* p. 543.

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the jury a larger choice in deciding. But this verdict has little practical value since the accused goes free just as if the verdict were "not guilty." It is also sometimes detrimental to the defendant who is innocent and yet upon whose reputation there is left the stain of suspicion.

In 1894 was presented in the French Parliament a law called the "Martineau project" which proposed eight degrees of guilt to each of which corresponded certain penalties, such as death, hard labor for life, hard labor, etc. The jury was to determine the degree of guilt and the judge was to apply the penalty.¹

After deciding the question of guilt the jury presided over by the judge could determine the punishment.² This would prevent the acquittals which sometimes take place now because the jury is uncertain what the penalty will be if it convicts.

The necessity of securing a unanimous decision in English and American courts frequently causes long delays and great uncertainty which is a very bad thing for justice. It is true that this rule is for the protection of the accused in order that he shall not be condemned unless all twelve jurors have been fully persuaded of his guilt. But there are probably very few cases in which the decision represents a real unanimity. In most cases the minority yields to the majority on account of the pressure brought to bear upon it to reach a decision.

¹ Blanc: in the *Nouvelle revue*, Paris, 1894.

² Cf. André Bougon: *De la participation du jury à l'application de la peine*, Paris, 1900.

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Even if the decision is not to be by a bare majority it might be by eight or nine out of twelve. "If, then, two out of three can justly decide a case, why cannot eight or nine out of twelve jurymen do the same? In view of the number of obstinate, perverse, and corrupt jurymen that are to be found, it does not appear right that in every instance the plaintiff in civil actions or the prosecutor in the criminal ones, should be compelled to have a unanimous verdict in order to gain their cause."¹ Already in some of the American States there is a tendency towards this reform as in Utah and Oklahoma where in criminal cases less grave than felonies only a three-fourths majority is needed, the same being true in all civil cases. The same system somewhat modified exists in Missouri.

The number of jurors was hit upon by chance. As we have seen jurors were originally witnesses and a considerable number were then required. A large number may also have been needed in the past in order to give the jurors courage. But there is no particular reason now why the jury should number twelve. A smaller number, as, for example, seven would be much less expensive. It is possible also that the discussion in a smaller jury would be more coherent and logical than in a larger jury since its members would come into closer touch with each other.

A system similar to the jury system is that in which a small number of citizens sit with the judge as lay assessors and judge both fact and law. In

¹ E. A. Thomas: *Op. cit.*

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France where these assessors are called "*échevins*" there are a few courts in which this system is used and the same is true in a number of other European countries. But this system is used the most in Germany where the assessors are called "*schöffen*." The judge sits sometimes with two, sometimes with four, sometimes even with as many as six of these assessors. Most of the less important crimes in Germany are tried in these courts. It is evident that the lay assessor is much more of a judge than the juror since he judges questions of law as well as of fact. The assessors are said to be more or less incompetent and tend to acquit in the case of crimes of a class that they are likely to commit.¹ It is to be noted that they are like jurors in these respects. But their decisions are on the whole better than those of a jury since the judge presides over them. Furthermore there is not as much delay in bringing cases to trial as there is before a jury.

In some cases where technical knowledge is involved it may be wise to have juries with technical knowledge. These would be juries of experts and would be free from some of the faults of ordinary juries. When the accused is a woman it may sometimes be well to have a jury of women. As a matter of fact the common law provided for a jury of women in one case, and in some of the Western States where woman suffrage exists a woman who is a party to a suit has the right to demand a jury of women in certain cases.

¹ Jean Cruppi: *Op cit.*

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These reforms which we have suggested may correct in a measure the faults of the jury. But let us now consider the objections which are made to the fundamental principles on which the jury is based and weigh them with the principal arguments in favor of the jury.

In the first place the jury is not fitted to the institutions and character of many races. As we have seen the jury was introduced rather abruptly into Continental procedure after the French Revolution. Its use had not developed gradually in Continental countries, consequently it did not always harmonize well with other political and social institutions. Furthermore the character of many races unfits them for performing jury service. For example peoples of the South tend to be governed too much by their emotions and passions in making their decisions. The jury has perhaps been most successful in England where it has developed gradually and has become an integral part of the national life. Its success there has also been due to the sober and sterling character of the people and the high esteem in which individual rights are held though, as we have seen, the jury has not always been successful in defending them.

It is sometimes contended in behalf of the jury that there is a connection between the suffrage, or making the law, and serving on juries, or administering the law.¹ It is said that under a democratic régime the people are able to watch over the administration of the laws by means of the jury.

¹ Cf. Henry Crompton : *Our Criminal Justice*, London, 1905.

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But there are reasons for making a distinction between electoral right and judicial function. In the first place the jury confuses legislative and judicial functions and it is probably better to have the judicial functions performed by an agency standing somewhat apart from the people. Furthermore, the judicial function requires a certain amount of special knowledge which is not necessary for the electoral right. Ferri has compared the two as follows: "The suffrage is an elementary right, the judicial function is a technical function; these are very different things not only by their nature, but also by their object; the voter only designates a person whom he considers provided with certain general qualities; the juror must pronounce a judgment which should be the result of a very complicated critical examination. The action of the voter has only an indirect efficacy; no more; it is in itself the avowal that the voter makes of his inaptitude to perform the charge which is entrusted to more capable persons; the action of the jury, on the contrary, has a direct and immediate efficacy, and assumes that there exists in the agent a special and recognized capacity."¹

The jury has been prohibited from judging questions of law because it is not supposed to know enough to do so. But to judge a question of fact is very frequently more difficult than to judge a question of law whether it is a question of evidence or of the guilt of a person. A judge in deciding a question of law has usually a limited

¹ *Op. cit.* pp. 550-551.

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number of solutions and has precedents on which to base himself. A jury has no precedents and no system of jurisprudence on which to base itself and it has frequently a large number of possible solutions. And yet it takes a special knowledge to decide these questions of fact as we have seen in our study of the anthropological characteristics of the criminal, the psychology of testimony, etc. Specialization is needed in the decision of these questions of fact as it is needed for the questions of law and it is the principle of specialization that the jury violates. "While, in professions, trades, and business of all sorts, special training and special skill are universally regarded as the indispensable conditions of success, or even of admission, it is a curious anomaly that men without experience or discipline are chosen for jurors, that is, for the discharge of functions virtually judicial, and for the accurate sifting and weighing of conflicting testimony."¹

Perhaps the principal argument in favor of the jury is that it keeps the judge and justice in touch with the public. It keeps the judge informed of the state of the public conscience and judges according to the prevailing standard of morality. "From their position in life its members are likely to know more of the parties and witnesses, and are consequently better able to enter into their views and motives; and from the novelty of their situation they bring a freshness and earnestness to the inquiry, which the constant habit of deciding,

¹ E. A. Thomas: *Op. cit.*

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adjudicating and punishing dims and blunts more or less in the mind of every judge."¹ There may be certain practical reasons for keeping justice on a level with the prevailing moral standard in order to keep the people in sympathy with justice. But the administration of justice should also tend to raise the moral standard and to accomplish this it should be superior, as much as is practicable, to the ideas, prejudices, etc., of a people.

As a school of citizenship the jury may disseminate a little legal knowledge among the public but the gain in this direction is scarcely sufficient to pay for the expense and trouble it causes the jurors. "It places an unjust burden upon those who are compelled to serve as jurors. Numerous are the complaints that the valuable time of intelligent business men is, without any reasonable compensation, occupied in hearing and settling petty disputes between their idle and quarrelsome neighbors. Very often they could much better afford themselves to pay the amount involved than to waste their time in serving. These are the jurors that courts desire to have impaneled. Upon the other hand, those idle hangers-on of courts, who always wish to be drawn, are the very persons who are most objectionable."² Furthermore, constant attempts at evasion do not make the jury appear as the "best means of inculcating civic duty" in the average citizen. By codifying the law and

¹ W. M. Best: *The Principles of the Law of Evidence*, London, 1906, 10th edition, p. 71.

² E. A. Thomas: *Op. cit.*

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in other ways a knowledge of the law can be disseminated. And if the jury results in a maladministration of justice its utility for educating the public certainly cannot be justified.

We have already noted the influence the jury has had upon the English law of evidence. This law has been devised in order to protect the jury against being influenced by unimportant testimony. A good deal of evidence is excluded notwithstanding the fact that the hearsay evidence or opinion of a person of good intelligence and character may be worth more than the direct evidence of an inferior person. In France hearsay evidence and opinion are usually judged by experienced judges who are capable of separating the wheat from the chaff and who are not hampered by rules of evidence and case law. The English law of evidence, on the contrary, increases the complexity of the procedure and frequently delays its action. "The question of what is and what is not proper, in the way of testimony, to go before a jury, raises one of the most delicate and difficult points within the scope of jurisprudence. The number of motions made in reference to such matters, and the amount of delay caused thereby, would, if a correct statement of them were published, startle the country. The charge of the court, the conduct of the jury, and the behavior of the bailiff also furnish plenty of material for applications for new trials. The admission of incompetent evidence of a feather's weight has often caused a fair verdict to be set aside, an actual

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murderer to be given a new trial, or a just claimant to be put to yet greater expenses of litigation and still further delay."¹ Were it not for the jury the law of evidence could be much simpler and less rigid.

It is now very evident that the decisions of juries are more or less governed by chance. Science can play no part in them, only common sense and very rarely good sense. The jury system violates the principle of the division of labor, which is now recognized in nearly every sphere of human activity, because it does not utilize specialized knowledge. And yet the use of scientific methods of judging facts and guilt is imperative. This necessity is fatal to the jury system.

We must therefore face the question of the abolition of the jury. The principal objection raised is the difficulty of replacing it in the present procedure. It is contended that the jury is preferable to the judge on account of certain criticisms made of the judge which will be considered in the next chapter on the judiciary. But under a scientific régime the jury can be replaced by scientifically trained judges who will be free from most of the faults of the jury and also of the judges of to-day.

The jury system has had an important political aspect in the past which still exists to a certain extent to-day. The jury was one of the means by which the people exercised a power in the government though, as we have seen, it was not as successful as is usually supposed in defending the

¹ E. A. Thomas: *Op. cit.*

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people's rights and liberties. This made the jury a political as well as a judicial institution. Napoleon the First regarded the jury as purely political in its origin and claimed the right of suspending trial by jury and did so in certain departments. But these political reasons for the jury scarcely exist any longer under the present democratic régime when the people have a large legislative as well as judicial power. "There is no real warrant for the perpetuation of the jury system, beyond the constitutional, and perhaps conjectural, tradition which attributes to it a large share in the vindication and preservation of Anglo-Saxon liberties."¹ The old axiom that a man should be tried by his peers has become meaningless now that a large measure of political equality exists. As one writer has put it: "Does a man cease to be my peer because he is a judge, after having passed several years of his life in studying the laws?"² If this principle were rigidly applied criminals would be tried by criminals, children by children, etc.

Such political value as the jury has may be preserved by retaining it for political crimes and press offenses which tend to be public and political in their character. It is true that in history the jury has tended to be either servile or rebel in political cases. But this will probably be less frequent in the future since tyrannical and despotic power is less likely to exist. Lombroso has suggested that a list of jurors from the educated classes be elected

¹ O. E. Bodington: *Op. cit.* p. 120.

² L. Smyers: *Le jury en matière criminelle*, Nice, 1885.

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by the people from which would be drawn the juries for political cases.¹ However, this might put too much power in the hands of one class and destroy political equality. As Ferri has expressed it: "I think it useful to preserve the jury for political crimes and offenses of the press and of social interest, although for these last the judgment of the jurors may suffer from the influence of class interests, which can be combatted only by making a large place in the jury for the social class of the workers, which is excluded from it to-day."²

There are difficulties in the way of using the jury for press offenses. Very frequently an ordinary jury will refuse to convict a journal because it does not see before it the guilty writer. It knows that the defendant representing the paper is a man of straw and is unwilling to inflict a penalty upon a man who is morally innocent. Furthermore the trial of a journal is usually fought on broader issues than the character of the plaintiff. It is the character of the government, administration, etc., which he represents which is really at issue. Consequently a good deal of political feeling and prejudice enters into the decision of such a case by an ordinary jury. It is indeed a difficult problem to determine the best method of trying these press offenses. On the one hand it is essential to democratic institutions that the press should be left as free as possible for the expression of public opinion. On the other hand, without any

¹ Lombroso and Laschi: *Le crime politique*, Paris, 1892.

² *Op. cit.* pp. 552-553.

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legal restraint the press becomes an unofficial prosecutor without bounds to its power of prosecuting persons and policies. The jury has proved to be rather inefficient for the trial of these cases. The judge is supposed to be too susceptible to governmental influence. Cruppi has suggested that press offenses be tried by a judge with two men of letters as lay assessors who would be both judges and experts.¹ Possibly in the future there will be a judge sufficiently impartial and independent to judge these cases successfully.

The grand jury differs from the petit jury in that it is a jury of examination and not of judgment and also because it considers only the cause and not at all the defendant since the accused does not appear before it. But some of the criticisms of the petit jury apply also to the grand jury. It has not the trained power of attention of the professional judge and has no knowledge of the psychology of testimony by means of which to estimate the value of testimony. It is, furthermore, a very cumbersome and expensive way of making the preliminary examination and since very little time is given to each case the examination cannot be thorough. This examination should be made by a judge similar to the French *juge d'instruction* who would be well acquainted with the psychology of witnesses and with every means of detecting evidence and estimating its value.

¹ *Op. cit.*

CHAPTER XI

THE JUDICIARY

We have now reached the highest rank in the legal hierarchy, that of the judge. Judicial functions were originally performed by the king or chief of a tribe. Later they were delegated by him to judges who frequently were priests. These judges had a judicial power equal to that of the king which was nearly if not quite supreme. They were not restricted by rules of procedure or penal codes.

But our principal interest in the history of the judiciary is in the part it has played in the two typical forms of procedure which we have described. As we have already noted, in the procedure of accusation the judge is an arbiter between two private parties. In the procedure of investigation he is the delegate of society whose duty it is to conserve the interests of society.

When public prosecution was introduced into the systems of procedure based on the procedure of accusation the judge acted sometimes as counsel for the defense. This was true in English procedure down to a comparatively recent date. Blackstone refers to this function of the judge in the following passage: "It is a settled rule at

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common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue in any capital crime, unless some point of law shall arise proper to be debated. A rule, which (however it may be palliated under cover of that noble declaration of the law, when rightly understood, that the judge shall be counsel for the prisoner; that is, shall see that the proceedings against him are legal and strictly regular) seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law. And the judges themselves are so sensible of this defect, that they never scruple to allow a prisoner's counsel to instruct him what questions to ask, or even to ask questions for him, with respect to matters of fact; for as to matters of law, arising on the trial, they are *entitled* to the assistance of counsel."¹ But this function of the judge resulted from the temporary derangement of the balance between the two parties to a trial by the introduction of public prosecution. It is obvious that this is not a legitimate function for a judge since it puts him in a partizan position.

There are various restrictions upon the power of a judge. In the first place there are the laws governing procedure and the penal code which defines crimes and fixes the penalties. In the second place the judge is limited by the jury which has the power of determining questions of fact in many cases.

The personnel of the criminal bench is composed

¹ *Commentaries*: Book IV, Chap. 25.

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usually of lawyers with a purely legal training. Some of them are members also of the civil bench where they do most of their work.

The criminal bench may be divided into two classes, that of the examining magistrate and that of the judge for judgment. In England and America the examining magistrate is also a police magistrate who has the power of summary trial in certain cases. But this power is incompatible with the most efficient examination on the part of the magistrate. He cannot be so open-minded and so active in his investigation if he knows that he must come to a final decision and must, therefore, be constantly stopping to weigh the evidence. The position of the French *juge d'instruction* is preferable in this respect since his function is only that of examining. His powers may possibly be too arbitrary and too extensive but his facilities for making a careful examination are far superior to those of the Anglo-American examining magistrate.

The judge has exclusive powers of judging only in less important cases in most civilized countries since the graver crimes are usually tried by a jury. Let us review briefly the functions of the judge in a trial before the jury. In the first place the judge has supervision over the taking of evidence. In English and American courts the judge interprets and applies the law of evidence. In Continental procedure the presiding judge conducts the examination and since the law of evidence is very elementary he has a discretionary authority as to what evidence shall be admitted, etc. After

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the examination and contradictory debate in Anglo-Saxon procedure comes the charge of the judge to the jury. In this summing up the judge is supposed to state the law connected with the case and to review the evidence only as much as is necessary for this statement of law. He is not expected to express his opinion but will very frequently show it and is likely to influence the jury by doing so. If the jury brings in a verdict of guilty the judge pronounces the sentence. The power of the judge in determining what the penalty shall be has been increasing recently. On the Continent the expedient of extenuating circumstances gives the judge a certain amount of latitude in determining the penalty and the indeterminate sentence does the same in America. The suspension of sentence and conditional release also increase the powers of the judge. It has also been suggested that the judge be given the power of pardoning but this is scarcely necessary, when he has the powers of suspending sentence and of conditional release.

The principal object of this chapter is to determine whether the powers of the judge should be increased still more and in particular as to whether the jury should be superseded by the judge. And first must be considered the faults of the judge which serve as objections to such an increase in his powers.

The judge of to-day tends to regard the criminal as a juridical abstraction. This results from the exclusively legal training of the judge and we

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shall discuss later on the measures by which this tendency can be prevented. It is contended that the judge tends to see guilt in every accused person. The champions of the jury have made a great deal of this criticism and have undoubtedly carried it too far. It is true that a long experience in performing judicial functions and the condemnation of many criminals may develop in a judge the tendency to regard every defendant as guilty. But this is not necessarily the case and it probably depends to a large extent upon the temperament of the judge. As we have seen there are certain features of Continental procedure which stimulate this tendency in judges, as, for example, reading the record of the preliminary examination before the trial and conducting the examination during the trial, but these features can and should be changed. The publicity of the trial is a check upon the judge since the public would quickly resent any grave partiality of the judge against the accused. The decision of a judge is rarely ever absolute and many guarantees of individual rights exist in the way of appeal, revision of sentences, etc., and these guarantees are increasing as punishment is becoming more individualized. For this reason also judges will manifest this tendency less since they will be influenced more by the character and personality of each defendant and will not be so likely to read guilt into the circumstances which led to the prosecution.

The true functions of the judge are to estimate the value of evidence and to perscribe the right

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treatment. This last he should do only tentatively but his power may be extended over the treatment itself by means of the periodic revision of sentences which will be discussed later. We must now consider how the judges can be better fitted for performing these functions. ✓

In the first place the criminal bench should be separated from the civil. It is from their exclusively legal training and their experience on the civil bench that arises the tendency of judges to regard the criminal as a juridical abstraction. This has also caused the antagonism of legal and scientific interests in procedure. Dominated as they are by legal standards many judges oppose the introduction of the scientific standards of criminology. Garofalo speaks as follows of the fitness of these judges for trying criminal cases: "Accustomed by the character of their studies to make an abstraction of man, they are occupied only with formulas. For the law is entirely indifferent to all that concerns the physique and the morale of individuals; the goodness or badness of a creditor could not have the least influence upon the validity of his credit. This strictly juridical character is very different from penal science which has for object to fight against a social infirmity, crime. The points of contact are rare between the two branches, which are for us two entirely different sciences. Why, therefore, should the same functionaries be used in two public services which are essentially foreign to one another? The member of a civil tribunal called to judge in a penal matter, keeps all his

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habits; it is not the individual that attracts his attention; it is the legal definition of the deed which preoccupies him. He thinks only of the interest of the law, the social interest escapes him."¹

The training which would develop a scientific criminal magistracy has been suggested in the preceding chapters. There should be a special course in the law school for those who wish to prepare for this branch of the judiciary. In this course should be studied, in addition to the fundamental principles of law and the legal aspects of procedure, criminal anthropology and sociology and the psychology of testimony. In connection with this course should be held clinics in prisons, hospitals, insane asylums and morgues. Already in the law schools at Paris and Lyons in France, at Rome in Italy and elsewhere on the Continent courses are being given in criminological and penal science and the scope of these courses should be extended and made compulsory for those who are preparing for the criminal magistracy. Then should come some experience in gathering and examining evidence in connection with the police force. Thus would be acquired an acquaintance with police methods and the ability to estimate the value of evidence. A temporary residence in a penal institution would also be advisable in order to study criminals at first hand and to become acquainted with penal methods. The student would now be prepared to take part in a trial as counsel. It would probably be best

¹ *La criminologie*: Paris, 1905, pp. 396-397.

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for him to commence as a public defender in order to avoid all possibility of ever becoming prejudiced against the accused. After a certain amount of experience as a public defender he should become a public prosecutor and then alternate between the two at more or less regular intervals as has already been described in the chapter on the prosecution and defense. This would prevent him from becoming biased on either side and would develop his ability to judge the value of evidence since he would have to view it from both sides.

From the ranks of the public prosecutors and defenders would be recruited the judges for the criminal bench. These judges would be free from most of the faults of the judges of to-day and would have the technical knowledge which the jury lacks. They would, therefore, be the logical substitutes for the jury.

The abolition of the jury would be beneficial in various other ways. The reforms we have suggested in the law of evidence in the way of making it more flexible and in reducing to a minimum the amount of evidence excluded could be accomplished. Where the accused have the choice between a summary trial and a trial by jury the summary trial is frequently chosen, showing a preference on the part of many people for a trial by a judge alone. In England summary jurisdiction acts were passed in 1879 and 1899, which gave magistrates the power to try and convict summarily in the case of many indictable offences on consent of the accused. This consent is usually given in order to have no

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delay before the trial, in hope of a shorter sentence if convicted, and on account of confidence in the fairness of the magistrates. The report of the Commissioners of Prisons for the year ending March 31, 1904, shows that 189,888 were received into the prisons of England and Wales, of whom 181,248 had been convicted and sentenced by magistrates alone and only 8,640 had been convicted by a jury. Of those convicted by magistrates 21,690 had consented to be tried summarily for indictable offenses, leaving 159,558 convicted by magistrates summarily for non-indictable offenses.¹ These figures show that a considerable number preferred trial by a judge to trial by jury and they also show that only a very small percentage of trials are by jury, in this particular instance the percentage being a little more than four and a half. And yet there has been no protest against having the judges try these cases. This would seem to indicate that even to-day trial by a judge is preferable to trial by jury. One great advantage of trial by a judge is the sobriety and calmness of the procedure, because counsel leave out the claptrap and oratory which they use before a jury. A notable example of this is furnished by the Dutch courts. In Holland there has never been a jury. A visit to a Dutch court shows the marked difference between it and courts in other countries where juries are used. The counsel are much quieter and more to the point in their

¹ Sir Kenelm Digby: in the introduction to *Our Criminal Justice*, by Henry Crompton, London, 1905.

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arguments and the judges are much more attentive and take many notes.

There are many more checks upon a judge than upon a jury. Stephen has stated some of them in the following passage: "The securities which can be taken for justice in the case of a trial by a judge without a jury are infinitely greater than those which can be taken for trial by a judge and jury. 1. The judge is one known man, holding a conspicuous position before the public, and open to censure, and, in extreme cases, to punishment if he does wrong: the jury are twelve unknown men.... 2. Juries give no reasons, but judges do in some cases, and ought to be made to do so formally in all cases if juries were dispensed with. This in itself is a security of the highest value for the justice of a decision. An unskilled person may no doubt give bad reasons for a sound conclusion, but it is nearly impossible for the most highly skilled person to give good reasons for a bad conclusion and the attempt to do so would imply a determination to be unjust which would be most uncommon. 3. From the nature of the case there can be no appeal in cases of trial by jury, though there may be a new trial."¹

If then even to-day trial by judges is so much preferable to trial by jury, how much more so will it be when judges are trained as indicated above and are capable of using scientific methods.

The problem as to how the independence of the

¹ J. F. Stephen: *A History of the Criminal Law of England*, London 1883, Vol. I, pp. 568-569.

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criminal bench is to be conserved will become still more important when trial by jury has been abolished. In the lower grades of the judicial hierarchy in which the judge holds the highest rank the choice of men for positions would have to be by examination. Already in Germany examinations are required of those who are preparing for judicial positions.¹ But in the higher ranks an examination would not be an adequate test. On the Continent judges are usually appointed for life by the Government. The permanent tenure of office gives them a certain amount of independence. But even so they are to a certain extent under the influence of the executive power, for their advancement depends upon it. In the United States the tendency has been towards the election of judges. An objection to this is the temporary tenure of office though this has been partially removed by making the terms very long. If the criminal magistracy is to become a special profession it is essential that the tenure of office should be more or less permanent. It is, however, hard to determine by whom the choice is to be made, whether by the executive power, by the legislative power, or by the people. The judiciary should not be too much under the influence of any one force and yet it must be under an efficient control. Public impeachment would be a power which could act as a control in extreme cases. But ordinarily such

¹ W. Mittermaier: in the *Penal Codes of France, Germany, Belgium and Japan*, edited by S. J. Barrows, Washington, 1901, p. 109.

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a control could probably be exercised best by a board of discipline composed of high executive, legislative and judicial officials. On account of its composite character as representing all branches of the government it would be impartial when exercising its power over the judiciary.

To-day when a judge has sentenced a criminal he is able to dismiss him from his mind. Rarely ever does he have to revise his sentence and then it is usually on some purely technical legal ground. Thus the judge is not made to feel very keenly the consequences of his acts. And yet he should feel these consequences in order to increase his sense of responsibility. He should be acquainted with the results in the criminals. His sense of responsibility would be greatly increased if he were given the power of periodically revising the sentences or at least a share in this power. In this connection the question as to whether a single judge is preferable to a plurality of judges is of considerable importance. It is contended in behalf of the single judge that he feels wholly responsible for his acts while a plurality of judges tends to destroy the feeling of responsibility of each judge. The single judge, therefore, uses greater care in his decisions and is governed by a higher moral standard. For these reasons the single judge would probably be preferable in most cases. In some cases, however, it might be advisable to have several judges where each would be a specialist in one branch of the broad field of knowledge which contributes to making a wise decision in a

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complicated case. Such a board of judges would correspond to a jury of experts and would give a consensus of opinion upon the case under examination like a consultation of doctors.

The abolition of the jury and the increasing individualization in the treatment of the criminal will greatly increase the importance of judicial functions. And this is quite in accordance with the contention we have already made that procedure is more important than the penal code, because procedure is of interest to all society, to honest people as well as to criminals, while the penal code is of interest only to criminals. The judiciary represents procedure and administers it. Hence a good judiciary is more important than a good penal code. As Ferri has put it: "To defend society against criminality, only reforms of the penal code are thought of ordinarily, while it is necessary before everything else to secure a good judicial organization by choosing carefully the personnel, then to attend to the technical organization of repressive measures, in the next place with reforms to be introduced into the code of penal procedure (which is the code of honest people) and only in the last place with reforms of the penal code (which is the code of criminals). We find upon this point an eloquent contrast between England—where penal legislation, not yet codified, is theoretically very imperfect, but where the judges are excellent, which results in making the administration of penal justice satisfactory, and Italy, where we have employed twenty-five years of study

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in compiling a penal code; where we have in return a penal magistracy incapable from a scientific point of view and without independence with respect to the executive power; where the administration of penal justice is discredited, vexatious for honest people, powerless against malefactors."¹

Thus we see the supreme importance of having an able and efficient criminal magistracy. In order to attract to it the men of the best quality, it will be necessary to offer adequate remuneration and permanency of occupation. These will also be guarantees against the danger of bribery. The training which we have outlined above will give them the necessary special knowledge. By the study of law and of social science they will come to appreciate the relation between society and the criminal and will understand the significance of crime in the social economy. By the study of the scientific methods of gathering evidence, the psychology of testimony, the law of evidence and the technical rules of procedure they will become competent to judge as to the commission of crime. By the study of the social and anthropological causes of crime and the scientific methods of penal treatment they will be able to prescribe treatment wisely for the criminal. This preliminary theoretic education will be supplemented as we have seen by an extensive and varied practical experience in the different branches of procedure.

These judges will be able to gather a great deal of anthropological and sociological data which the

¹ *Op. cit* p. 525.

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judges of to-day are incapable of doing. These data will be of the greatest value in developing the science of criminology and increasing its applications to procedure. Upon the decisions of judges will be based a system of jurisprudence which, though it can never be as exact as a jurisprudence based on a penal code, will yet increase the wisdom and certainty of decisions as time goes by.

CHAPTER XII

THE NEW CRIMINAL PROCEDURE

In the course of the preceding chapters several changes have been suggested the object of which is to make of practical utility the data of criminal anthropology and sociology. These changes are sufficiently numerous and sufficiently fundamental in their character to transform criminal procedure more or less completely. Let us see what will be this new procedure in which all these changes will be embodied.

The first step in the new procedure as in the old must be the gathering of evidence. "The first inquiry, the fundamental inquiry, in a penal judgment directed according to the new scientific principles, will consist still and always in ascertaining if the accused is really the author of the deed submitted to judgment, and in determining the motives and circumstances of the deed itself."¹ As we have seen, the police is the first agency for gathering evidence. To accomplish this task policemen should be trained to know what is evidence, to recognize it when they see it and to know how to make a record of it. In the second place scientific

¹ E. Ferri: *La sociologie criminelle*, Paris, 1905, p. 512.

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methods of examination should be used in order to get as much information as possible out of the evidence which has been gathered. The data of experimental psychology should be utilized in examining witnesses. In the third place expert testimony should be used as much as possible.

The contradictory debate should be retained for the exposition of evidence, since it presents the evidence in the greatest detail and shows clearly the relative strength of the two sides. The prosecution and defense should be conducted by trained advocates employed by the State who will be able to analyze and show the significance of anthropological and sociological as well as of legal evidence.

For the weighing of evidence there is the judge prepared for his work by a training, both theoretic and practical, which has been described in the last chapter. The lay jury will be abolished with the possible exception of its retention for political crimes. But a jury of experts may sometimes be used for the decision of technical points.

In the organization of the new judicial system cases will be distributed among the different courts according to the nature of the cases and their importance. The courts will be specialized for the trial of certain classes of cases and cases belonging to these classes will be sent to them. Cases decided in the lower courts may be appealed to the higher courts under certain conditions. The extension of the indeterminate sentence will destroy the necessity of appealing with regard to the length

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of the sentence, thus lessening the number of cases to be appealed.

In this connection the important question of the relation of criminal procedure to penal treatment must be considered. Procedure must govern penal treatment to a certain extent since it determines the class of criminals to which a criminal belongs and reveals many personal characteristics. It cannot, however, govern penal treatment absolutely since in the course of treatment much will be learned about the criminal which will influence the nature of the treatment. On the other hand the data gathered in the course of the treatment must have a great deal of significance for procedure since it will determine more precisely the classification of criminals and will furnish a much broader basis of facts for judgment. On account of this action and reaction between procedure and penal treatment it is evident that there must be a close connection between the two. In fact, as both belong to society's system of repressing crime there is a direct continuity between them. This continuity can be established in practise by means of the periodic revision of sentences.

We have seen that the principle of the individualization of punishment requires that sentences shall be indeterminate. It is, however, a practical impossibility to make sentences absolutely indeterminate since the responsible authority cannot have all the cases under consideration at the same time. It therefore becomes necessary to revise each sentence at periodic intervals leaving the sentence

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determinate between the revisions. Thus imprisonment becomes a period of observation during which the adaptability of the criminal for social life is determined. Scientific management of prisons is necessary in order to gather the data on the basis of which this decision can be made. Then at each revision it can be determined whether the detention should be terminated or continued and if continued whether the same or a different treatment shall be applied.

Now the important question is what authority shall revise these sentences. At Elmira Reformatory we already have a system of revising sentences periodically. Here after a prisoner has remained the minimum period his sentence is revised every six months by a board of parole composed of one or two reformatory officials and a number of outside officials. This system is not strictly scientific since the members of this board aside from those who are officials of the reformatory cannot know much about the prisoners and have no special training for this work. But it suggests a permanent board of revision specially trained for this work. Such a system is contemplated by Ferri who says that "sentences will be revised periodically during their execution by permanent technical commissions, who will limit rigorously the duration of isolation to the time necessary for the social readaption of those isolated."¹

But another method which has been suggested is that the judges shall revise the sentences. By

¹ *Op. cit.* p. 633.

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so doing the continuity between procedure and penal treatment will be established in practise. The decisions of the judges would, of course, be based upon the data furnished them by the prison authorities and upon examination of the prisoners. From this work they would learn a great deal which would help them when conducting the procedure. Their responsibility would be greatly increased so that a judge would be responsible for his acts beyond the original sentence. The penal judgment would no longer be a definite and irrevocable decision. We have no space to discuss the details of this system which belongs more to penology than to procedure and which will have to be worked out in practise. But the necessity of establishing in practise the connection between procedure and penal treatment has been shown.

Before we close it may be well to consider the forces by means of which the new criminal procedure will be evolved. Each epoch has its own criminality which requires a procedure somewhat special. When crimes were violent and bloody a stern and arbitrary system of repression was necessary. Furthermore, public opinion has a great deal to do with the kind of procedure in a given epoch. When there was a strong popular feeling of vengeance against the criminal the procedure was necessarily vengeful in its character.

The procedure we have outlined is undoubtedly well fitted for the criminality of the present and can be easily adapted to any form of criminality which may arise in the future. But a feeling of

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vengeance towards criminals still exists to a certain extent so that it would not be possible to introduce this procedure suddenly. The popular attitude to-day towards the criminal has been described in the following passage: "The man who has shown himself hateful for society excites in his turn our hate, and appears to us to merit it. Sick or well, with a will free or determined, he is odious to us and we detest him, above all if he has injured one of our kindred or has taken our property. Let us understand how distant is the time of that supreme serenity which would be so becoming to Justice, the time when, the heart freed from narrow egotism and from fear, our mind will retain for the most atrocious murderers only a mild and troubled pity! At the present time if the tribunals and courts of assizes dared to show themselves gentle, to put a criminal in the hospital as a sick person, and if they refused to administer to him social vengeance, punishment, the people would not understand and far from having recourse to them would take justice into their own hands."¹

It is probably just as well that this procedure cannot be introduced suddenly since it seems incompatible with the respect owing to justice to change its forms suddenly. Tarde has suggested this in the following remark: "Be revolutionary in social science, but conservative in politics or in criminal justice."² Furthermore, conservative opposition to new ideas tends to select from them

¹ Maurice de Fleury: *L'âme du criminel*, Paris, 1898, pp. 107-108.

² *La philosophie pénale*, p. 427.

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the good and useful ideas and to reject the bad ones. The slowness resulting from this process of selection and rejection results in the new ideas becoming firmly fixed in the minds of the people and the institutions based upon them being upon a stable foundation. It is, however, important that this opposition should not be carried too far so as to retard progress unduly.

The scientific spirit is already disseminated to a certain extent and the recent modifications in procedure which we have described are preparing the way for greater changes in the future. The study of criminology should be continued in order to develop the science as rapidly as possible. Data accumulated in the practical workings of procedure should be utilized, especially as procedure becomes more scientific. As we have seen, the classical school has finished its work so that there ought to be a revival of the study of criminal jurisprudence in order to develop a new jurisprudence based on scientific principles.

As large a body as possible of intelligent and educated opinion should be developed which will bring pressure to bear upon legislatures in favor of these reforms. The legislator is usually somewhat behind the science of his time and such pressure from outside is necessary to force him to utilize the results of scientific research in legislation. To accomplish this end commissions should be appointed to study these problems and to propose constructive legislation.

The last few paragraphs make evident what has

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been implied many times in the course of this book, namely, that the evolution of the new criminal procedure depends upon the dissemination of a higher sense of justice. The new procedure will in turn set a much higher standard of justice which will take into consideration the forces which have made the criminal. Criminal procedure will thus become one of the most important agencies for bringing to pass social justice.

Crime is the most serious manifestation of the weak places in the social organism. When once the treatment of the criminal is governed by a knowledge of the forces which have caused him and his crime there will be good reason to hope that these causes will, in large part, be removed.

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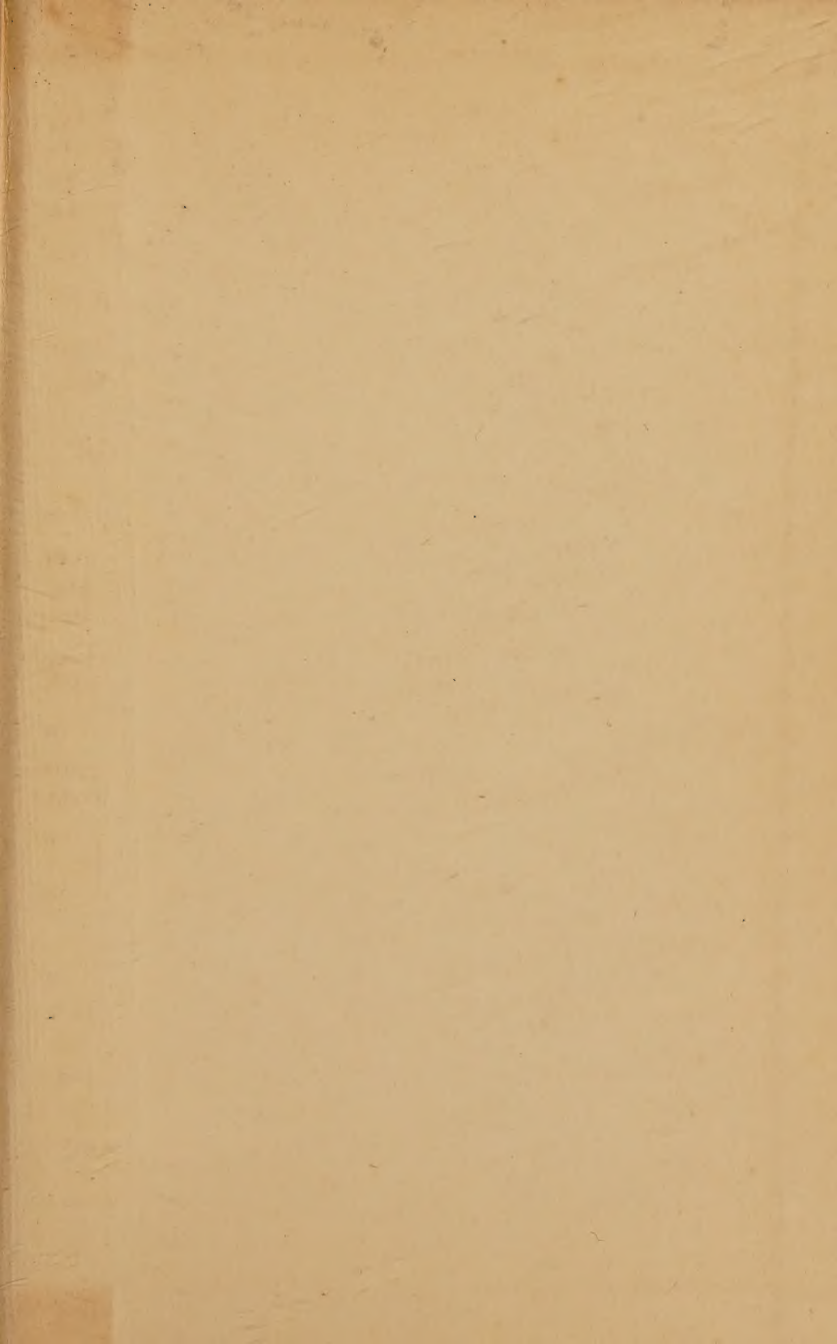
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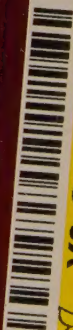
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